

No. 9442

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United States

VOL  
2208

# Circuit Court of Appeals

For the Ninth Circuit. /

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BARNARD-CURTISS COMPANY, a corporation,  
Appellant,

vs.

ERNEST MAEHL,

Appellee.

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## Transcript of Record


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Upon Appeal from the District Court of the United States  
for the District of Montana.

FILED

MAR 28 1940

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

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Attorneys for Plaintiff and Appellee.

Mr. HOWARD TOOLE  
of Missoula, Montana, and

Mr. W. T. BOONE  
of Missoula, Montana,  
Attorneys for Defendant and Appellant.

[1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and  
for the District of Montana

No. 1714

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY, a corporation,  
Defendant.

Be it remembered that on May 6, 1938, Complaint  
was filed in the above-entitled court, being in the  
words and figures following, to wit: [2]

In the District Court of the Third Judicial District  
of the State of Montana, in and for the County  
of Granite

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY, a corporation,  
Defendant.

### COMPLAINT

The plaintiff complains of the defendant and  
alleges:

First.

For a first cause of action against the defendant  
herein plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That on or about the 22nd day of July, 1936, at Philipsburg, in the County of Granite, Montana, the Plaintiff and the defendant entered into a certain agreement wherein and whereby the plaintiff agreed to perform certain work, [3] labor and timber clearing for the defendant, and to clear of brush and timber a certain tract of land consisting of 118 acres, upon which said tract of land the defendant was engaged in, or about to commence the construction of a certain dam and reservoir for the storage of certain waters of the East Fork of Rock Creek, in the County of Granite, State of Montana, and the defendant promised and agreed to pay the plaintiff One Hundred (\$100.00) Dollars per acre therefor.

3.

That pursuant to said agreement and on or about the 24th day of August, 1936, the plaintiff com-

menced the said work, labor and clearing of the said tract of land and completed the said work, labor and clearing of the said tract of land, consisting of 118 acres of clearing, as aforesaid, on the 17th day of January, 1937.

## 4.

That plaintiff performed each and all of the terms and conditions of said agreement and the defendant promised and agreed to pay the plaintiff therefor One Hundred Dollars for each and all of the 118 acres of land so cleared, as aforesaid, amounting to the sum of \$11,800.00, and that said work, labor and clearing was reasonably worth said sum, but the defendant has not paid the same nor any part thereof except the sum of Eight Thousand Three Hundred Sixty and 30/100 (\$8,360.30) Dollars, and there now remains due and unpaid on said agreement from said defendant to plaintiff herein the sum of Three Thousand Four Hundred Thirty-nine and 70/100 (\$3,439.70) Dollars, together with interest thereon at the rate of six per cent. per annum since the 17th day of January, [4] 1937, no part of which has been paid to the plaintiff herein.

## Second

For a second cause of action against the defendant herein plaintiff complains and alleges:

## 1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized

under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

## 2.

That on or about the 1st day of September, 1936, at the city of Philipsburg, Granite County, Montana, the plaintiff and the defendant entered into a certain agreement wherein and whereby the plaintiff agreed to perform certain work, labor and grubbing, and to grub out, clear away and remove all stumps, roots and other debris from the surface of a certain gravel bar and tract of land consisting of twenty acres for use by defendant as and for a gravel pit. That said tract of land or gravel pit is on the East Fork of Rock Creek, in the County of Granite, Montana, and in the immediate vicinity of and at the place where defendant was then engaged in, or about to commence the construction of a certain dam and reservoir for the storage of certain waters of said East Fork of Rock Creek, in said Granite County, Montana, which said gravel pit was prepared for the use of the defendant in [5] the construction of said dam and reservoir, and the defendant promised and agreed to pay the plaintiff Sixty-five (\$65.00) Dollars per acre for

said work, labor and grubbing in preparing said gravel pit.

## 3.

That pursuant to said agreement and on or about the 1st day of September, 1936, the plaintiff commenced the said work, labor and grubbing in preparing said gravel pit and completed the same and finished with the removal of all stumps, roots and other debris on said twenty acre tract of land and gravel pit, and completed the preparation of said gravel pit on or about the 1st day of October, 1936.

## 4.

That plaintiff performed each and all of the terms and conditions of said agreement and the defendant promised and agreed to pay the plaintiff therefor Sixty-five (\$65.00) Dollars for each and all of the said twenty acres of land so grubbed and cleared of stumps, roots and other debris, as aforesaid, amounting to the sum of Thirteen Hundred (\$1300.00) Dollars, and that said work, labor, grubbing, clearing of stumps, roots and other debris in preparing said gravel pit was reasonably worth said sum, and the defendant has not paid the same nor any part thereof, and there now remains due and unpaid on said agreement and from said defendant to the plaintiff herein the sum of Thirteen Hundred (\$1300.00) Dollars, together with interest thereon at the rate of six per cent. per annum since the 1st day of October, 1936, no part of which has been paid.



Third

For a third cause of action against the defendant [6] herein the plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, State of Montana.

2.

That between the 24th day of August, 1936, and the 17th day of January, 1937, at the dam and reservoir on the East Fork of Rock Creek, in the County of Granite, State of Montana, plaintiff performed certain work, labor and services for the defendant, at the special instance and request of defendant, in cutting, preparing for use and saving for the defendant herein approximately six thousand stulls.

3.

That said work, labor and services so rendered by the plaintiff for the defendant in cutting, preparing for use and saving for the defendant the said stulls was and is reasonably worth Four Hundred Twenty-four (\$424.00) Dollars.

## 4.

That the defendant has not paid the same nor any part thereof, and there now remains due and unpaid to the plaintiff from the defendant on account of said stulls the sum of Four Hundred Twenty-four (\$424.00) Dollars, together with interest thereon at the rate of six per cent. per annum [7] since the 17th day of January, 1937, no part of which has been paid.

## Fourth

For a fourth cause of action against the defendant herein the plaintiff complains and alleges:—

## 1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office.

## 2.

That between the 29th day of June, 1936, and the 21st day of August, 1936, at the County of Granite, Montana, the plaintiff performed certain services for the defendant, at the special instance and request of defendant, and that said services

consisted of and in hauling and transporting certain workmen and employees of defendant to and from the city of Philipsburg, and the West Fork Road Camp of defendant, on the West Fork of Rock Creek, all in the County of Granite, Montana.

3.

That the said services so rendered by the plaintiff for the defendant herein was and is reasonably worth One Hundred Five and 60/100 (\$105.60) Dollars.

4.

That the defendant has not paid the same nor [8] any part thereof, and there now remains due and unpaid to the plaintiff from the defendant on account of said services the sum of One Hundred Five and 60/100 (\$105.60) Dollars, together with interest thereon at the rate of six per cent. per annum since the 21st day of August, 1936, no part of which has been paid.

Fifth

For a fifth cause of action against the defendant herein plaintiff complains and alleges:—

1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State

of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

## 2.

That between the 13th day of September, 1936, and the 2nd day of October, 1936, inclusive, at the County of Granite, Montana, the plaintiff performed certain services for the defendant, at the special instance and request of defendant and that said services consisted of and in hauling workmen, material and supplies of and for the defendant to and from the city of Philipsburg and the Barnard-Curtiss construction camp on the East Fork of Rock Creek, all in the County of Granite, State of Montana. [9]

## 3.

That the said services so rendered by the plaintiff for the defendant herein was and is reasonably worth Sixty-four (\$64.00) Dollars.

## 4.

That the defendant has not paid the same nor any part thereof, and there now remains due and unpaid to the plaintiff from the defendant on account of said services the sum of Sixty-four (\$64.00) Dollars, together with interest thereon at the rate of six per cent. per annum since the 2nd day of October, 1936, no part of which has been paid.

Sixth

For a sixth cause of action against the defendant herein plaintiff complains and alleges:—

1.

That at all of the times hereinafter mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

2.

That between the 15th day of September, 1936, and the 9th day of November 1936, inclusive, at the Barnard-Curtiss Construction Camp on the East Fork of Rock Creek, in Granite County, Montana, the plaintiff performed services for the defendant, at the special instance and request of [10] defendant, as Superintendent and Foreman in the building and construction of camp buildings at the above named construction camp.

3.

That defendant promised and agreed to pay plaintiff for said services. One and 20/100 (\$1.20) Dollars per hour, and during said period plaintiff worked and performed services for defendant, as

aforesaid, a total of 423 hours and earned the sum of Five Hundred Seven and 60/100 (\$507.60) Dollars, which said sum the defendant promised and agreed to pay to the plaintiff for said work and services.

## 4.

That the defendant has not paid the same nor any part thereof except the sum of Three Hundred Fifty-nine and 55/100 (\$359.55) Dollars, and that there now remains due and unpaid from the defendant to the plaintiff for and on account of said work and services the sum of One Hundred Forty-eight and 5/100 (\$148.05) Dollars, together with interest thereon at the rate of six per cent. per annum since the 9th day of November, 1936, no part of which has been paid to the plaintiff herein.

## Seventh.

For a seventh cause of action against the defendant herein plaintiff complains and alleges:

## 1.

That at all of the times herein mentioned the defendant was, and still is, a corporation, organized under the laws of the State of Minnesota, having its principal office and its principal place of business at the city of Minneapolis, in the State of Minnesota, and during all of the [11] times herein mentioned said corporation was authorized to transact business in the State of Montana, and had and maintained a branch office at the city of Philipsburg, in the County of Granite, Montana.

## 2.

That on or about the 23rd day of August, 1936, at Philipsburg, Granite County, Montana, the plaintiff, at the special instance and request of the defendant, delivered to the defendant certain tools, machines and merchandise for use by defendant in the construction of a certain dam and reservoir on the East Fork of Rock Creek, in Granite County, Montana, which said tools, machines and merchandise and the value thereof is as follows, to-wit: 16 axes, value \$46.30; 2 cant hooks, value \$6.00; 6 wedges, value \$1.00; 2 single jacks, value \$3.00; 3 saw handles, value \$1.50; 2 skidding chains, value \$3.00; 1 pair chain tongs, value \$9.00; 1 log chain, value \$12.00; and 10 pieces 2 inches by 12 inches and 16 feet long planks, value \$9.60, all of the value of Ninety-one and 40/100 (\$91.40) Dollars, and that defendant promised and agreed to return the said tools, machines and merchandise to the plaintiff within a reasonable time after said 23rd day of August, 1936, or to pay the plaintiff the reasonable value thereof.

## 3.

That a reasonable time for the defendant to return the said tools, machines and merchandise to the plaintiff has elapsed before the commencement of this action and the defendant has failed to return the said tools, machines and merchandise, or any part thereof, to the plaintiff and defendant has not paid the plaintiff for the same or for any part thereof. [12]

## 4.

That the reasonable value of the said tools, machines and merchandise delivered to the defendant by the plaintiff, as aforesaid, is the sum of Ninety-one and 40/100 (\$91.40) Dollars, and the defendant has not paid the same to the plaintiff, nor any part thereof, and there now remains due and owing to the plaintiff from the defendant, for and on account of said tools, machines and merchandise delivered to the defendant, as aforesaid, the sum of Ninety-one and 40/100 (\$91.40) Dollars, together with interest thereon at the rate of six per cent. per annum since the 26th day of August, 1936, no part of which has been paid.

Wherefore, plaintiff prays for judgment against the defendant, as follows, to-wit:

1. For the sum of \$3,439.70, together with interest thereon at six per cent. per annum since the 17th day of January, 1937.
2. For the sum of \$1,300.00, together with interest thereon at six per cent. per annum since the 1st day of October, 1936.
3. For the sum of \$424.00, together with interest thereon at six per cent. per annum since the 17th day of January, 1937.
4. For the sum of \$105.60, together with interest thereon at six per cent. per annum since the 21st day of August, 1936.
5. For the sum of \$64.00, together with interest thereon at six per cent. per annum since the 2nd day of October, 1936.
6. For the sum of \$148.05, together with interest thereon at six per cent. per annum since the 9th day of November, 1936, and



7. For the sum of \$91.40 together with interest thereon at six per cent. per annum since the 26th day of August, 1936.

And for plaintiff's costs herein incurred.

J. J. McDONALD

Philipsburg, Montana,

Attorney for Plaintiff. [13]

State of Montana,  
County of Granite,—ss.

Ernest Maehl, of Philipsburg, Granite County, Montana, being first duly sworn deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein alleged to be on information and belief and that as to those matters he believes it to be true.

ERNEST MAEHL

Subscribed and sworn to before me at Philipsburg, Granite County, Montana, this the 12th day of April, 1938.

[Notarial Seal] · J. J. McDONALD

Notary Public for the State of Montana, residing at Philipsburg, Montana.

My commission expires on June 22, 1938.

[Endorsed]: Filed in State Court April 14, 1938.  
Removed and filed in Federal Court, May 6, 1938.  
C. R. Garlow, Clerk. [14]

Thereafter, on May 6, 1938, demurrer to complaint, was filed in the above-entitled court, being in the words and figures following, to-wit: [15]

In the District Court of the Third Judicial District  
of the State of Montana, in and for the County  
of Granite.

ERNEST MAEHL,

Plaintiff

vs.

BARNARD-CURTIS COMPANY,  
a corporation,

Defendant.

### DEMURRER

Now comes the defendant in the above entitled action and demurs to the complaint of plaintiff on file herein upon the grounds and for the reasons:

#### I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

#### II.

The defendant demurs particularly to that portion of the complaint set out as a first cause of action, upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

## III.

The defendant demurs particularly to that portion of said complaint set out as a second cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant. [16]

## IV.

The defendant demurs particularly to that portion of said complaint set out as a third cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

## V.

The defendant demurs particularly to that portion of said complaint set out as a fourth cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

## VI.

The defendant demurs particularly to that portion of said complaint set out as a fifth cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant.

## VII.

The defendant demurs particularly to that portion of said complaint set out as a sixth cause of action upon the ground and for the reason that the

same does not state facts sufficient to constitute a cause of action against the defendant.

### VIII.

The defendant demurs particularly to that portion of said complaint set out as a seventh cause of action upon the ground and for the reason that the same does not state facts sufficient to constitute a cause of action against the defendant. [17]

The foregoing demurrer is filed in the above entitled action at the time of filing of defendant's petition and bond for the removal of the above entitled action to the United States District Court for the District of Montana, and without waiving any of its rights as set forth in said petition for removal and without submitting itself to the jurisdiction of the above entitled court in any particular but solely for the purpose of preventing and avoiding the default by the defendant in the above entitled action in any manner whatsoever.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant.

[Endorsed]: Filed in State Court April 29, 1938. Removed and filed in Federal Court May 6, 1938. C. R. Garlow, Clerk. [18]

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Thereafter, on May 6, 1938, the Order Removing Case to Federal Court, was filed in the above-entitled court, being in the words and figures following, to-wit: [19]

In the District Court of the Third Judicial District  
of the State of Montana, in and for the County  
of Granite.

ERNEST MAEHL,

Plaintiff

vs.

BARNARD-CURTIS COMPANY,  
a corporation,

Defendant.

### ORDER

The defendant herein, having, within the time provided by law, filed its petition for removal in this cause to the District Court of the United States for the District of Montana, and having at the same time offered its bond in the sum of Five Hundred and no/100 (\$500.00) Dollars, with good and sufficient surety, pursuant to statute, and conditioned to law;

It is ordered by the Court that said Petition be accepted; that said Bond be approved and accepted; that this cause be removed for trial to the District Court of the United States for the District of Montana, pursuant to the statute of the United States; and that all other proceedings in this Court be stayed.

Dated this 3rd day of May, 1938.

R. E. McHUGH

Judge

[Endorsed]: Removed and filed in Federal Court,  
May 6, 1938. C. R. Garlow, Clerk. [20]

Thereafter, on October 1, 1938, the Order of the Court Overruling Demurrer was duly made and entered herein, the minute entry of said order being in the words and figures following, to-wit: [21]

In the District Court of the United States in and for the District of Montana.

No. 1714

ERNEST MAEHL vs. BARNARD-CURTIS CO.

This cause was duly called for hearing this day on demurrer to the complaint, Mr. J. J. McDonald appearing for the plaintiff and Mr. Howard Toole appearing for the defendant. Thereupon, on the statement of Mr. Toole that an answer has now been filed herein, court ordered that the record in this case show that an answer having been filed and counsel for defendant having stated in open court that there was thereby a waiver of the demurrer, said demurrer was by the court overruled. Thereupon, after hearing the statements of counsel, court ordered that the setting of the case for trial be passed for the present.

Entered in open court at Missoula, Montana, October 1, 1938.

C. R. GARLOW,  
Clerk. [22]

---

Thereafter, on October 1, 1938, Answer was duly filed herein, being in the words and figures following, to-wit: [23]

In the District Court of the United States for the  
District of Montana, Missoula Division.

No. 1714

ERNEST MAEHL,

Plaintiff

vs.

BARNARD-CURTIS COMPANY,  
a corporation,

Defendant.

ANSWER

Now comes the defendant, Barnard-Curtis Company and in answer to the first cause of action of plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's first cause of action.

II.

Defendant denies each, every and all of the allegations of paragraphs 2, 3 and 4 of plaintiff's first cause of action.

Answering Plaintiff's Second Cause of Action, this Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's second cause of action. [24]

## II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's second cause of action.

Answering Plaintiff's Third Cause of Action,  
This Defendant Admits, Denies and Alleges:

## I.

Admits the allegations of paragraph 1 of plaintiff's third cause of action.

## II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's third cause of action.

Answering Plaintiff's Fourth Cause of Action,  
This Defendant Admits, Denies and Alleges:

## I.

Admits the allegations of paragraph 1 of plaintiff's fourth cause of action.

## II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's fourth cause of action.

Answering Plaintiff's Fifth Cause of Action,  
This Defendant Admits, Denies and Alleges:

## I.

Admits the allegations of paragraph 1 of plaintiff's fifth cause of action.



II.

This defendant denies each, every and all of the alle- [25] gations contained in paragraphs 2, 3 and 4 of plaintiff's fifth cause of action.

Answering Plaintiff's Sixth Cause of Action,  
This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's sixth cause of action.

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's sixth cause of action.

Answering Plaintiff's Seventh Cause of Action,  
This Defendant Admits, Denies and Alleges:

I.

Admits the allegations of paragraph 1 of plaintiff's seventh cause of action.

II.

This defendant denies each, every and all of the allegations contained in paragraphs 2, 3 and 4 of plaintiff's seventh cause of action.

III.

Defendant denies each, every and all of the allegations contained in plaintiff's complaint and not

hereinbefore specifically admitted, qualified or denied. [26]

Further Answering Plaintiff's Complaint and as a First Counter-claim Thereto, This Defendant Alleges:

I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and duly qualified to engage in the business of general contracting within the State of Montana.

That in the month of July, 1936, defendant became the successful bidder and was awarded the contract for the construction of an earth and rock fill dam for the Montana State Water Conservation Board on Rock Creek in Granite County, Montana. That a part of the said contract required this defendant to clear and grub 6.98 acres of land on the damsite and that during the month of July, 1936, this defendant made a verbal agreement with the plaintiff Ernest Maehl to clear and grub the said 6.98 acres on said damsite as required by the plans and specifications attached to the said contract, and made a part thereof. That the said plaintiff, Ernest Maehl, undertook and agreed to furnish all of the labor, equipment and materials for the purpose of carrying out the terms and provisions of said verbal contract and that this defendant then and there agreed to pay the said Ernest Maehl the sum of One

Hundred (\$100.00) Dollars per acre for the labor, equipment and materials so to be furnished by him.

II.

That the said Ernest Maehl entered upon the work then and there agreed by him to be performed but that before the said work had been completed and before the said 6.98 acres had been cleared and grubbed the said Ernest Maehl abandoned the same and failed to complete the work therein agreed upon. [27]

That during the progress of the work performed by the said Ernest Maehl this defendant advanced to the said plaintiff the sum of Seven Hundred Seventy-four and 45/100 (\$774.45) Dollars.

That had the said plaintiff completed the said work provided for in said verbal agreement he would have earned the sum of Six Hundred Ninety-eight (\$698.00) Dollars, but that by reason of his failure to complete the said verbal contract and to clear and grub the said 6.98 acres as agreed upon, this defendant was required to complete the same and that the total cost of completion to this defendant was the sum of Seven Hundred Seventy-four and 45/100 (\$774.45) Dollars.

That by reason thereof this defendant was damaged by the failure of the said Ernest Maehl to enter upon and complete the said clearing and grubbing as agreed upon by him, and that the damage sustained by this defendant was and is the sum of

Seven Hundred Seventy-four and 45/100 (\$774.45) Dollars.

### III.

That by reason thereof there is due, owing and unpaid from the plaintiff to this defendant the sum of Seven Hundred Seventy-four and 45/100 (\$774.45) Dollars.

Further Answering Plaintiff's Complaint and as a Further Defense and Second Counter-claim Thereto, This Defendant Alleges:

#### I.

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and duly qualified to engage in the business of general contracting within the State of Montana. [28]

That during the month of July, 1936, this defendant became the successful bidder and was awarded the contract for the construction of an earth and rock fill dam for the Montana State Water Conservation Board on Flint Creek, in Granite County, Montana.

That as a part of the work under said contract this defendant was required to clear the timber from approximately 50 acres of land on the east end of the reservoir site on said project.

#### II.

That on the 18th day of January, 1937, this defendant made and entered into a written contract

with the plaintiff, Ernest Maehl, wherein and whereby the said plaintiff and the defendant agreed that plaintiff would clear said 50 acre tract and remove the timber therefrom and defendant would pay plaintiff the sum of One Hundred (\$100.00) Dollars per acre for such clearing. That a true and exact copy of said contract marked Exhibit "A" is hereunto attached and by reference thereto made a part hereof.

That the plaintiff Ernest Maehl, entered upon said clearing contract but that after having cleared 24 acres thereof the said plaintiff abandoned and breached said contract and failed and refused to proceed any further with the clearing thereof and that this defendant thereupon was required to complete the said clearing and did actually take over the said clearing and complete the same.

That the plaintiff, Ernest Maehl, earned under the said contract the sum of Two Thousand Seven Hundred and  $33/100$  (\$2,700.33) Dollars but that the defendant herein advanced and loaned unto said plaintiff the sum of Four [29] Thousand Seven Hundred Seventy-nine and  $84/100$  (\$4,779.84) Dollars and that at the time of the abandonment of said contract by the plaintiff there was due, owing and unpaid to this defendant from the said plaintiff the sum of Two Thousand Seventy-nine and  $51/100$  (\$2,079.51) Dollars.

That when the said plaintiff, Ernest Maehl, abandoned the said contract and breached the same and

failed to proceed with the said clearing, this defendant was required under its contract with the Montana State Water Conservation Board to take over and complete the said clearing and that this defendant did take over and complete the clearing of the said 50 acre tract and expended in labor, materials and supplies the sum of Six Thousand Eight Hundred Sixty-two and  $85/100$  (\$6,862.85) Dollars in completing the contract so abandoned and breached by the said Ernest Maehl.

### III.

That by reason thereof this plaintiff was damaged by the failure of the said plaintiff, Ernest Maehl to complete the said contract, in the total sum of Eight Thousand Nine Hundred Forty-two and  $36/100$  (\$8,942.36) Dollars, no part of which has been paid by the said plaintiff, Ernest Maehl and that by reason thereof there is due, owing and unpaid from the plaintiff to this defendant on its second counter-claim the sum of Eight Thousand Nine Hundred Forty-two and  $36/100$  (\$8,942.36) Dollars.

Wherefore, this defendant prays judgment as follows:

- (1) That plaintiff shall take nothing by his said complaint herein. [30]
- (2) That defendant shall have judgment against the said plaintiff on its first counter-claim in the sum of Seven Hundred Seventy-four and  $45/100$  (\$774.45) Dollars.
- (3) That this defendant shall have judgment against the said plaintiff on its second

counter claim in the sum of Eight Thousand Nine Hundred Forty-two and 36/100 (\$8,942.36) Dollars, and

- (4) That defendant shall have judgment for its costs herein disbursed and expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant. [31]

United States of America

State of Montana

County of Missoula—ss.

Howard Toole, being first duly sworn on his oath, deposes and says:

That he is one of the attorneys for the defendant, Barnard-Curtis Company in the above entitled action, and makes this verification for and on behalf of said defendant for the reason that the defendant is a corporation and has no officer within the County where affiant resides and has his office; that he has read the foregoing Answer, knows the contents thereof and that the matters and things therein stated are true to the best of his knowledge, information and belief.

HOWARD TOOLE

Subscribed and sworn to before me this 30th day of Sept. 1938.

[Seal] W. T. BOONE

Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires Aug. 2, 1941.

Service of the within answer is hereby acknowledged and copy received this 1st day of October, 1938.

J. J. McDONALD

Atty. for Ptf. [32]

### EXHIBIT "A"

#### CLEARING CONTRACT

This agreement, made and entered into this 18th day of January 1937 by and between Barnard-Curtiss Company of Minneapolis Minnesota as party of the first part and Ernest Maehl of Philipsburg Montana as party of the second part, Witnesseth:

That Whereas, the party of the first part has entered into a contract with the Montana State Water Conservation Board to construct the Flint Creek Dam and whereas the party of the second part desires to subcontract from the First Party the clearing of approximately fifty (50) acres on the East end of the reservoir site on said project, to all of which the party of the first part is agreeable.

Now therefore, in that behalf and in consideration of the promises by each party hereto to the other party made, it is agreed as follows:

The Party of the Second part shall, perform all of the said work in full compliance with the contract between the first party and the State of Montana for said work, all, in accordance with the plans and specifications requirements and instructions made furnished or given by said Montana State



Water Conservation board or the engineer in charge of said work, it being clearly the intent and purpose of this agreement that the party of the second part shall be subject to and bound by all of the provisions and conditions of the contract between the State of Montana and the party of the first part, which contract with proposals, plans and specifications covering said project are, hereby made a binding part of this agreement.

Now Therefore, in consideration of the faithful performance of the said work herein specified by the party of the second part and within the time hereinafter set forth the party of the first part will pay and the party of the second part will accept as full and satisfactory compensation for said work the following prices:

For Clearing approximately Fifty acres of Reservoir site @ \$100.00 per acre.

Payment will be made on the final estimate of the engineer in charge as furnished by the State Water Conservation Board and final payment has been made to Party of the first part.

It is understood and agreed that the Party of the first part will pay Labor and other costs as the work progresses and all such costs including wages of the party of the second part, compensation insurance, bond, public liability Insurance, office expense, social security Tax and Old *Old* Age pension tax and any other charges which are proper [33] against the work, will be deducted from final payment to the party of the second part. A special condition of this

agreement is that if at any time in the judgment of the engineer in charge or the party of the first part, the work is not being properly managed or conducted, or not carried on in accordance with the specifications and requirements, or if the work is progressing too slow to warrant the completion within the time specified, the party of the first part has the right to put on necessary equipment, hire labor, purchase materials, and supplies, pay for the same and charge all such expenditures to the party of the second part and deduct the same from any money which may become due him.

It is also a special condition of this agreement that the party of the first part has the right to remove and dispose of any timber on the said project in lieu of burning by the party of the second part.

The party of the second part agrees to give his full personal time and attention in supervising the said work in order to facilitate progress at all times, that he will commence operations at once and the said work on or before March 15th 1937.

Executed as of the day and year first above written.

Signed  
BARNARD-CURTISS CO.  
By J. A. BARNARD  
ERNEST MAEHL

Witnesses  
H. E. MARTIN  
H. E. MARTIN

[Endorsed]: Filed Oct. 1, 1938 [34]

Thereafter, on April 5, 1939, Reply to Counterclaims Contained in Defendant's Answer, was duly filed herein, being in the words and figures following, to-wit: [35]

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIMS CONTAINED  
IN DEFENDANT'S ANSWER

For reply to the first counterclaim contained in defendant's answer, plaintiff admits, denies and alleges as follows, to-wit:

I.

Admits that the defendant is a corporation, organized and existing under the laws of the State of Minnesota and qualified to do business in Montana.

Admits that the defendant was awarded a contract for the construction of a dam for the Montana State Water Conservation Board on Rock Creek in Granite County, Montana.

Admits that the defendant made a verbal agreement with the plaintiff, Ernest Maehl, to clear and grub 6.98 acres on the dam-site and that Ernest Maehl agreed to furnish labor, materials and equipment for the purpose of carrying out said verbal contract and, in this connection, plaintiff alleges that the 6.98 acres to be cleared and grubbed as aforesaid was merely a portion of 118 acres which the plaintiff agreed to clear at the contract price of One Hundred Dollars (\$100.00) per acre. [36]

## II.

Admits that plaintiff, Ernest Maehl, entered upon the work agreed by him to perform.

Admits that the defendant advanced to the plaintiff the sum of Seven Hundred Seventy-four Dollars and Forty-five Cents (\$774.45) but, in this connection, alleges that the said sum so advanced was merely a portion of a larger sum advanced on the entire contract to clear said 118 acres.

Denies each and every other allegation, matter and thing contained in Paragraph II of said first counterclaim.

## III.

Denies each and every allegation, matter and thing contained in Paragraph III of said first counterclaim.

Further Replying to Defendant's Second Counterclaim as Contained in Defendant's Answer, This Plaintiff Admits, Denies and Alleges:

## I.

Admits the allegations of Paragraph I of said second counterclaim contained in defendant's answer.

## II.

Admits that, on the 18th day of January, 1937, the defendant made and entered into a written contract with the plaintiff wherein and whereby the plaintiff agreed that the plaintiff would clear said

50-acre tract and remove the timber therefrom and that the defendant would pay the plaintiff the sum of One Hundred Dollars (\$100.00) per acre for such clearing. Admits that Exhibit "A" attached to defendant's answer is a true and exact copy of said contract. [37]

Admits that the plaintiff, Ernest Maehl, entered into said clearing contract and, having cleared 24 acres of said lands, in this connection alleges that the plaintiff partially cleared an additional 12 acres thereof.

Denies that the plaintiff earned under said contract the sum of Two Thousand Seven Hundred Dollars and Thirty-three Cents (\$2,700.33) and in this connection alleges that the plaintiff earned in excess of said sum. Alleges that the plaintiff is without knowledge or information sufficient to form a belief as to the truth of the averment that the defendant advanced the plaintiff the sum of Four Thousand Seven Hundred Seventy-nine Dollars and Eighty-four Cents (\$4,779.84) and, in this connection, alleges to the best knowledge and information of the plaintiff that the defendant advanced the sum of Four Thousand Two Hundred Twenty-one Dollars and Fifty Cents (\$4,221.50).

Denies each and every allegation, matter and thing contained in Paragraph II of said second counterclaim not herein specifically admitted or denied.

## III.

Denies each and every allegation, matter and thing contained in Paragraph III of said second counterclaim.

Further Replying to Said Second Counterclaim and by Way of an Affirmative Defense Thereto, Plaintiff Alleges:

## I.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota and duly qualified to engage in business in the State of Montana.

## II.

That, on or about the 18th day of January, 1937, plain- [38] tiff and defendant entered into a contract, a copy of which is attached to defendant's answer as Exhibit "A" and by this reference made a part hereof.

## III.

That, on or about the 18th day of January, 1937, the plaintiff entered into and upon the performance of the work contemplated by said contract and cleared 24 acres of the lands involved in said contract and partially cleared an additional 12 acres of the lands involved in said contract.

That, on or about the 12th day of March, 1937, it was orally agreed and understood by and between the plaintiff and the defendant, by and through its agents thereunto duly authorized, that the written

contract of January 18, 1937 be mutually abandoned and rescinded and that, pursuant to said agreement and understanding, said contract was abandoned and rescinded and all rights and liabilities of both parties to said contract, arising out of said contract, were thereupon discharged.

Wherefore, having fully replied, plaintiff prays that defendant take nothing by its counterclaims and that the plaintiff have judgment as prayed in the cause.

J. J. McDONALD  
WALTER L. POPE  
RUSSELL E. SMITH  
KENDRICK SMITH  
Attorneys for Plaintiff [39]

DEMAND

Demand is hereby made of a trial by jury of all of the issues triable of right by a jury in the above entitled cause.

J. J. McDONALD  
WALTER L. POPE  
RUSSELL E. SMITH  
KENDRICK SMITH  
Attorneys for Plaintiff

Service of a copy of the foregoing reply and demand acknowledged this 3rd day of April, 1939.

HOWARD TOOLE  
W. T. BOONE  
Attorneys for Defendant.

[Endorsed]: Filed April 5, 1939. [40]

Thereafter, on April 11, 1939, motion for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the above entitled action, (excepting exhibits A, B and C, which are omitted by the designation of Appellant,) was duly filed herein, being in the words and figures following, to-wit: [41]

In the District Court of the United States for the  
District of Montana, Missoula Division.

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY,

a corporation,

Defendant,

C. A. METCALF,

Third Party.

MOTION FOR LEAVE TO SERVE SUMMONS  
AND COMPLAINT ON C. A. METCALF  
AND TO MAKE HIM A THIRD PARTY  
TO THE ABOVE ENTITLED ACTION.

Comes now the defendant Barnard-Curtiss Company, a corporation, and moves this Honorable Court for an order on five days notice to the plaintiff for leave to serve summons and complaint in this action upon C. A. Metcalf, an individual residing in Granite County, Montana, within the juris-



diction of this Court, said C. A. Metcalf being a person who is not a party to this action but who is or may be liable to this defendant or to the plaintiff for all or part of the claim of the plaintiff Ernest Maehl against this defendant, or liable to this defendant on its counter-claim against the plaintiff Ernest Maehl.

This motion is based upon the following documents:

1. The complaint in this action, to-wit, the complaint of Ernest Maehl filed against this defendant in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, and on motion of the defendant removed to the above entitled Court (Exhibit A). [42]

2. The answer of this defendant Barnard-Curtiss Company, a corporation, to the said complaint of the Plaintiff Ernest Maehl (Exhibit B).

3. The reply of the plaintiff Ernest Maehl to the answer of this defendant in this action (Exhibit C).

4. The complaint of C. A. Metcalf filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite (Exhibit D).

5. The complaint in the case of C. A. Metcalf vs. Barnard-Curtiss Company filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, in a second action (Exhibit E).

6. Upon the affidavit of James Barnard, one of the officers of the defendant corporation (Exhibit F).

In further support of this motion the defendant Barnard-Curtiss Company, a corporation, alleges:

That it appears from the complaint of the plaintiff Ernest Maehl (Exhibit A) that the said plaintiff in his first cause of action seeks to recover the sum of Three Thousand Four Hundred Thirty-nine and 70/100 Dollars (\$3439.70) from this defendant under an alleged verbal contract for clearing certain lands in Granite County, Montana, and it likewise appears from the complaint of C. A. Metcalf (Exhibit D) that he seeks to recover the sum of Two Thousand Nine Hundred Ninety Dollars (\$2990.00) from this defendant in the District Court in Granite County, Montana, for clearing the same land as that referred to in the complaint of Ernest Maehl.

That it appears from the third cause of action in the complaint of Ernest Maehl (Exhibit A) that he seeks to recover from this defendant the sum of Four Hundred Twenty-four Dollars [43] (\$424.00) for allegedly cutting six thousand (6000) stulls on the lands above referred to, and that it appears from the second complaint of C. A. Metcalf (Exhibit E) that he likewise seeks to recover the sum of Four Hundred Ten Dollars (\$410.00) from this defendant for the same six thousand (6000) stulls referred to in the complaint of Ernest Maehl.

That it appears from the answer of this defendant that it denies the making of the contracts referred to in the complaint of Ernest Maehl (Exhibit A) and in its answer (Exhibit B) counter-claims in two separate counter-claims against Ernest Maehl in the respective amounts of Seven Hundred Seventy-four and 45/100 Dollars (\$774.45) and Eight Thousand Nine Hundred Forty-two and 36/100 Dollars (\$8942.36).

That it cannot be determined without joining C. A. Metcalf as a party to this action who is or may be liable to this defendant either under the contracts alleged in this defendant's answer (Exhibit B) or under the purported contracts alleged in the complaint of the plaintiff Ernest Maehl (Exhibit A) or the two complaints of the said C. A. Metcalf (Exhibits D and E), and that while this defendant denies any liability either to Ernest Maehl or C. A. Metcalf it cannot be determined without joining said C. A. Metcalf to whom defendant may be liable if any liability exists.

That the presence of said C. A. Metcalf is required in the original action for the granting of complete relief in the determination of defendant's counter-claim and that jurisdiction can be obtained and that his joinder will not deprive the Court of jurisdiction of this action.

That the answer of the defendant has been filed and [44] that this motion is being made on five days notice to the plaintiff.

Wherefore, this defendant moves that this Court shall order that the said C. A. Metcalf be served

with summons and complaint in the above entitled action, and be made a party hereto.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant. [45]

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EXHIBIT D

In the District Court of the Third Judicial District  
of the State of Montana, in and for the County  
of Granite.

C. A. METCALF,

Plaintiff,

vs.

BARNARD-CURTIS COMPANY,

a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows, to-wit:

1.

That at all of the times herein mentioned, the defendant was, continued to be and now is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of Montana.

## 2.

That on or about the 1st day of September, 1936, the plaintiff and the defendant entered into a certain contract and agreement, in Granite County, Montana, wherein and whereby it was mutually agreed between them that the plaintiff would cut and burn the timber then on certain land to be designated by the defendant, lying approximately twenty miles south of Philipsburg, Granite County, Montana, in the vicinity of a dam then being constructed on the East Fork of Rock Creek, in said County, by the defendant, and that the defendant would pay to the plaintiff for cutting and burning such timber, [46] when the said work was completed the sum of One Hundred (\$100.00) Dollars per acre, and it was further mutually understood, promised and agreed that the plaintiff would clear, burn and grub the timber on certain land situated in the same vicinity as that hereinabove described, as designated by the defendant, and the defendant would pay to the plaintiff the reasonable value of the clearing, burning and grubbing the said land of timber. That said contract and agreement hereinabove referred to was oral and was not in writing.

## 3.

That thereafter and on or about the 7th day of October, 1936, this plaintiff in pursuance to said contract entered into and upon the land pointed out to him and designated by the defendant as the land

and premises from which plaintiff was to cut and burn the timber thereon, as provided in said contract and agreement, and commenced to cut and burn the timber thereon, and continued to cut and burn the timber thereon, from said last mentioned date until the 18th day of January, 1937, at which time he had completely performed all the things required of him to be performed by the terms of said contract, and had cut and burned all timber on said land, and that between said last mentioned dates the plaintiff cut and burned the timber upon Ninety-eight and 56/100 (98.56) acres of land so designated by the defendant, and for which the defendant had promised and agreed to pay to this plaintiff the total sum of Nine Thousand Eight Hundred Fifty-six (\$9856.00) Dollars; that also between the said last mentioned dates, the plaintiff cleared, burned and grubbed the timber upon Nine and one-half acres of land, designated by the defendant, as he had agreed to do, and the reasonable value of [47] doing such work and labor, that the defendant promised and agreed to pay was and is the sum of One Thousand Four Hundred Twenty-five (\$1,425.00) Dollars.

## 4.

That the said sum of Nine Thousand Eight Hundred Fifty-six (\$9,856.00) Dollars, and the One Thousand Four Hundred Twenty-five (\$1,425.00) Dollars, became due, owing and payable from the defendant, to this plaintiff, on the said 18th day of

January, 1937, but that the defendant has not paid the same, or any part thereof, save and except the sum of Eight Thousand Two Hundred Ninety-one (\$8,291.00) Dollars, and there is now due, owing and wholly unpaid from the defendant to this plaintiff, the sum of Two Thousand Nine Hundred Ninety (\$2,990.00) Dollars, which the defendant refuses to pay although demand has been made upon it for such payment, prior to the commencement of this action.

5.

That the said agreement hereinabove set out was made in, was to be, and was, performed in Granite County, Montana, and the plaintiff herein duly and regularly performed all the conditions precedent on his part to be performed under the terms and conditions of said contract and agreement.

11.

For a second and other count and statement of his cause of action the plaintiff complains and alleges;

1.

That at all of the times herein mentioned, the defendant was, continued to be and now is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of [48] Montana.

2.

That between the 1st day of September, 1936, and the 18th day of January, 1937, the plaintiff, at the

special instance and request of the defendant, and for its use and benefit performed work and labor for the defendant and rendered services to the defendant, in cutting and burning the timber then on certain land lying approximately twenty miles south of Philipsburg, Granite County, Montana, in the vicinity of a dam on the East Fork of Rock Creek, in said County, then being constructed by the said defendant, and in clearing, burning and grubbing the timber on certain land, lying in the same vicinity, that the said work and labor performed and services rendered by the plaintiff to the defendant, was and is the sum of Eleven Thousand Two Hundred Eighty-one (\$11,281.00) and the said defendant agreed and promised to pay to this plaintiff the reasonable value of his work and labor performed and services rendered, in doing the work and labor and performing the services hereinabove set out.

### 3.

That the reasonable value of the work and labor so performed by plaintiff for defendant, and the services so rendered was and is the sum of Eleven Thousand Two Hundred Eighty-one (\$11,281.00) Dollars, which the said defendant promised and agreed to pay. That said sum became due, owing and payable from the defendant to this plaintiff on the 18th day of January, 1937, but the defendant failed, refused and neglected to pay the same, or any part thereof, save and except the sum of Eight Thousand Two Hundred Ninety-one (\$8,291.00)



Dollars, and there is now due, owing and wholly unpaid from [49] the defendant to this plaintiff, the sum of Two Thousand Nine Hundred Ninety (\$2,990.00) Dollars, which the defendant refuses to pay although demand has been made upon it for such payment prior to the institution of this action.

3.

Plaintiff alleges that while he has stated his cause of action against the defendant in separate counts, he has but the one cause of action against the said defendant for the total sum of Two Thousand Nine Hundred Ninety (\$2,990.00) Dollars, and no more, and does not claim or assert to be entitled to recover any other or greater sum.

Wherefore, Plaintiff prays judgment against the defendant for the sum of Two Thousand Nine Hundred Ninety (\$2,990.00) Dollars, together with his costs of suit herein expended.

R. LEWIS BROWN

Attorney for Plaintiff. [50]

State of Montana  
County of Granite—ss.

C. A. Metcalf, being first duly sworn, on his oath says:

That he is the plaintiff named in the foregoing complaint, that he has read the same and knows its contents and that the matters and facts therein stated are true.

C. A. METCALF

Subscribed and sworn to before me this 20 day  
of July, 1938.

[Court Seal]

E. J. DONNELLY

Clerk of the District Court. [51]

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EXHIBIT E

In the District Court of the Third Judicial District  
of the State of Montana, in and for the County  
of Granite.

C. A. METCALF,

Plaintiff,

vs.

BARNARD-CURTIS COMPANY,  
a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action  
against the defendant complains and alleges as fol-  
lows, to-wit:

1.

That at all of the times herein mentioned the de-  
fendant was, continued to be and now is a corpora-  
tion, organized and existing under and by virtue of  
the laws of the State of Minnesota, and authorized  
to do business in the State of Montana.

2.

That between the 7th day of October, 1936, and the 18th day of January, 1937, the plaintiff at the special instance and request of the defendant, sold and delivered to the defendant, in Granite County, Montana, approximately Six Thousand (6,000) stulls, of the reasonable value of Four Hundred Ten (\$410.00) Dollars, and which said reasonable value the defendant promised and agreed to pay.

3.

That the said sum of Four Hundred Ten (\$410.00) [52] Dollars, became due, owing and payable on the 18th day of January, 1937, to this plaintiff, but the defendant, notwithstanding such fact, has wholly failed, refused and neglected to pay said sum or any part thereof, and there is now due, owing and wholly unpaid by the defendant to this plaintiff, the sum of Four Hundred Ten (\$410.00), Dollars, with interest thereon at the rate of eight per cent per annum from said 18th day of January, 1937, which the said defendant refuses to pay although demand for payment has been made upon it prior to the institution of this action.

11.

For a second and other cause of action in favor of the plaintiff and against the defendant, the plaintiff complains and:

1.

That at all of the times herein mentioned, the defendant was, continues to be and now is a corpora-

tion organized and existing under and by virtue of the laws of the State of Minnesota, and authorized to do business in the State of Montana.

## 2.

That between the 1st day of December, 1936, and the 9th day of May, 1937, at the special instance and request of the defendant, the plaintiff rented to the defendant, and the defendant hired from the plaintiff, certain work horses, the property of the plaintiff, and for which the defendant promised and agreed to pay the reasonable value of the rental and hiring of said horses.

## 3.

That the sum of One Hundred Seventy-nine (\$179.00) [53] Dollars is and was a reasonable sum for the defendant to pay for said horses and for their use and hire, and that the said sum of One Hundred Seventy-nine (\$179.00) Dollars, became due, owing and payable to this plaintiff from the defendant, on the said 9th day of May, 1937, but the defendant has failed, refused and neglected to pay the same, or any part thereof, although demand has been made upon it so to do, and there is now due, owing and wholly unpaid from the defendant to this plaintiff, the sum of One Hundred Seventy-nine and no/100 (\$179.00) Dollars, with interest thereon at the rate of eight per cent per annum from the said 9th day of May, 1937.

Wherefore, Plaintiff prays judgment against the defendant for the sum of Four Hundred Ten

(\$410.00) Dollars, with interest thereon at the rate of eight per cent per annum from the 18th day of January, 1937, as set out in his first cause of action;

For the sum of One Hundred Seventy-nine (\$179.00) Dollars, with interest thereon at the rate of eight per cent per annum from the 9th day of May, 1937, as set out in his second cause of action, and for his costs of suit herein expended.

R. LEWIS BROWN

Attorney for Plaintiff. [54]

State of Montana,  
County of Granite—ss.

C. A. Metcalf, being first duly sworn, on his oath says;

That he is the plaintiff named in the foregoing complaint, that he has read the same and knows its contents and that the matters and facts therein stated are true.

C. A. METCALF

Subscribed and sworn to before me this 20 day of July, 1938.

[Court Seal] E. J. DONNELLY

Clerk of the District Court. [55]

## EXHIBIT F

In the District Court of the United States for the  
District of Montana, Missoula Division.

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY,

a corporation,

Defendant,

C. A. METCALF,

Third Party.

## AFFIDAVIT OF J. A. BARNARD

United States of America

State of Montana

County of Missoula—ss.

J. A. Barnard, being first duly sworn, deposes and says:

That he is Secretary-Treasurer of Barnard-Curtiss Company, a corporation, and that he is and has been in the general control and management of said corporation for a period of ten years or more. That as such Secretary-Treasurer he is familiar with the contract between Barnard-Curtiss Company and the Montana State Water Conservation Board for the construction of the Flint Creek dam on Rock Creek in Granite County, Montana, and likewise familiar with all of the work done and performed in carry-

ing out the terms and conditions of said contract. That he is personally acquainted with Ernest Maehl and C. A. Metcalf, parties to the above entitled action. That all of the clearing and grubbing [56] referred to in the complaint of Ernest Maehl (Exhibit A) attached to the motion herein referred to and all of the clearing and grubbing referred to in the complaint of C. A. Metcalf (Exhibit D) attached to the motion herein referred to is and was clearing and grubbing upon identical lands. That the six thousand (6000) stulls referred to in the complaint of Ernest Maehl (Exhibit A) in the third cause of action and the six thousand (6000) stulls referred to in the complaint of C. A. Metcalf (Exhibit E) are identical stulls.

That Barnard-Curtiss Company denies that it is obligated or indebted to either Ernest Maehl or C. A. Metcalf but that said Ernest Maehl and C. A. Metcalf are each making demands upon Barnard-Curtiss Company for payment for clearing and grubbing the identical lands above referred to, and that each of said persons claims to have had contracts for clearing and grubbing said lands and that the lands referred to in said contracts are in the main identical lands. That Barnard-Curtiss Company denies that it is liable or obligated to either C. A. Metcalf or Ernest Maehl for the stulls referred to in said Exhibits but that both of said persons are claiming against Barnard-Curtiss Company under separate alleged contracts for having furnished said stulls.

That Barnard-Curtiss Company denies that it is obligated to either Ernest Maehl or C. A. Metcalf in any respect under any contracts whatsoever and alleges in its answer in the above entitled action (Exhibit B) that it has certain counter-claims in connection with contracts for clearing and grubbing the lands referred to and that said counter-claims are valid counter-claims. [57]

That it cannot be determined without joinder of C. A. Metcalf in the above entitled action what obligations or indebtedness exist between the parties unless the said C. A. Metcalf shall be joined as a party.

That C. A. Metcalf may be liable to this defendant upon said counter-claims and that his presence in this action is required for the granting of complete relief in the determination of this defendant's counter-claims.

That this affidavit is made in support of the motion of defendant Barnard-Curtiss Company to join the said C. A. Metcalf as a party to the above entitled action.

J. A. BARNARD

Subscribed and sworn to before me this 4th day of April, 1939.

[Seal] HOWARD TOOLE

Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires January 30, 1942.

[Endorsed]: Filed April 11, 1939. [58]



Thereafter, on April 24, 1939, Order Denying Motion of Defendant to make C. A. Metcalf a Third Party, was duly filed herein, being in the words and figures following, to-wit: [59]

District Court of the United States, District of Montana, Missoula Division.

No. 1714

ERNEST MAEHL,

Plaintiff,

v.

BARNARD-CURTIS COMPANY,  
a corporation,

Defendant.

### ORDER

The motion of the defendant Barnard-Curtis Company, a corporation, for leave to serve summons and complaint upon C. A. Metcalf and to make him a third party to the above entitled action, filed herein on April 11, 1939, is hereby denied.

Done in open court at Butte, Montana, April 24, 1939.

JAMES H. BALDWIN

United States District Judge  
District of Montana.

[Endorsed]: Filed and Entered April 24, 1939

[60]

Thereafter, on September 28, 1939, Motion to Refer Case to a Master to Take Evidence, and Affidavit of Howard Toole in Support of Said Motion, was duly filed herein, being in the words and figures following, to-wit: [61]

[Title of District Court and Cause.]

#### MOTION FOR REFERENCE

Now comes the defendant Barnard-Curtiss Company and by and through its Attorneys, Howard Toole, Esq., and W. T. Boone, Esq., moves this Honorable Court to refer the above entitled action to a master for the purpose of taking the evidence in said action. This motion is based upon the pleadings in this action and upon all of the other documents and papers herein filed and upon the affidavit of Howard Toole, one of the Attorneys for the defendant herein.

Dated this 27th day of September, 1939.

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant. [62]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America

State of Montana

County of Missoula—ss.

Howard Toole, being first duly sworn, deposes and says:

That he is one of the attorneys for Barnard-Curtiss Company, a corporation, defendant in the above entitled action, and that this affidavit is made in support of motion for the appointment of a master to hear the evidence in the above entitled action. That the issues in said action are complicated and that certain exceptional conditions as hereinafter set forth require the submission of this action to a master.

That the conditions which require the submission of this action to a master are as follows: [63]

That the plaintiff Ernest Maehl in his complaint alleges seven separate causes of action each of which is based upon an alleged oral contract. That all of the said oral contracts alleged in plaintiff's complaint arise out of certain items of alleged labor, materials and equipment alleged by said plaintiff to have been furnished to the defendant under said alleged contracts during the course of the construction of a certain dam in Granite County, Montana.

That the defendant in its answer denies the existence of said contract but in two separate cross-complaints alleges the existence of two other contracts one of which is alleged to be a verbal contract and

the other of which is alleged to be a written contract.

That in each and every instance of the seven alleged contracts referred to in plaintiff's complaint, if plaintiff shall prove the existence of such contracts the defendant will be required to prove the existence of offsets in the form of advancements of monies and equipment and supplies furnished to the plaintiff and that likewise defendant will be required to prove the existence of advancements furnished to the plaintiff under the contracts set forth in defendant's cross-complaint.

That in each and all of the said contracts it will be necessary for the plaintiff and defendant to account both with respect to the sums alleged to have been earned by plaintiff and the advancements made by defendant and that such accounting will involve an examination of plaintiff's books of account and defendant's books of account and the examination of a great number of defendant's vouchers. [64]

That this is an action in which the issues are complicated because of the necessity for said accounting and that the conditions existing are exceptional because of said accounting and that said action should be referred to a special master.

HOWARD TOOLE

Subscribed and sworn to before me this 27th day of September, 1939.

[Seal] W. T. BOONE

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2, 1941.

Due and personal service and receipt of copy of the foregoing Motion for Reference and Affidavit is hereby accepted this 27th day of September, 1939.

RUSSELL E. SMITH

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 28, 1939. [65]

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Thereafter, on October 5, 1939, Order of Court Denying Motion to Refer Case to a Master, was duly made and entered herein, the minute entry thereof being in the words and figures following, to-wit: [66]

[Title of District Court and Cause.]

This cause was duly called for hearing this day on defendant's motion to refer the case to a Master to take testimony, Mr. J. J. McDonald, Mr. Russell Smith and Mr. Allen Kendrick Smith appearing for the plaintiff, and Mr. Howard Toole appearing for defendant. Thereupon said motion was duly heard, argued and submitted; and, after due consideration, court ordered that said motion be and is denied. To this ruling of the court, the defendant then and there excepted and exception duly noted.

Entered in open court at Missoula, Montana, October 5, 1939.

C. R. GARLOW,

Clerk. [67]

Thereafter, on January 22, 1940, the Reporter's Transcript of Proceedings was duly filed herein, and is volume II of this transcript, numbered from page 69 to page 382, and is in the words and figures following, to-wit: [68]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED PROCEEDINGS  
AT THE TRIAL  
(TESTIMONY)

Appearances:

For Plaintiff:

J. J. McDonald,  
Philipsburg, Montana;  
Pope, Smith and Smith,  
Missoula, Montana.

For Defendant:

Howard Toole and  
W. T. Boone,  
Missoula, Montana. [69]

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[Title of District Court and Cause.]

Be It Remembered: That the above entitled cause came regularly on for trial at Missoula, Montana, on Saturday, the 14th day of October, 1939, at ten o'clock a. m., before the Honorable James H. Baldwin, Judge, and a jury duly and regularly empaneled and sworn to try said case. Plaintiff was represented by J. J. McDonald, attorney at law, of Phil-

ipsburg, Montana, and Messrs. Pope, Smith and Smith, attorneys at law, of Missoula, Montana. Defendant was represented by Howard Toole and W. T. Boone, attorneys at law, of Missoula, Montana.

Thereupon the following proceedings were had and taken and the following evidence and none other was introduced:

The case was regularly called for trial and both sides announced ready. A jury was drawn, examined, accepted and sworn to try the case. Thereupon opening statement on behalf of the plaintiff was made by Mr. Russell Smith.

And thereupon the following evidence was introduced by the plaintiff upon his case in chief. [72]

ERNEST MAEHL,

the plaintiff, was called as a witness in his own behalf and having been first duly sworn testified as follows:

Direct Examination

By Mr. Russell Smith:

Q. Will you state your name please?

A. Ernest Maehl.

Q. And where do you live Mr. Maehl?

A. Philipsburg, Granite County, Montana.

Q. How long have you lived in Philipsburg?

A. Twenty-eight years.

Q. And during that time what has your occupation been?

A. I follow contracting and jobbing.

(Testimony of Ernest Maehl.)

Q. During that course of time have you had any experience in logging work in the woods?

A. Yes sir.

Q. And how much experience in that type of work have you had?

A. Well I worked off and on in the woods practically all my lifetime—not steady.

Q. Are you acquainted with some of the officers of the Barnard-Curtiss Company?

A. Yes sir.

Q. Which of these officers do you know?

A. I think I know all of them.

Q. Who, if you know, is president of the Barnard-Curtiss Construction Company?

A. Jim Barnard.

Q. And when did you first become acquainted with Jim Barnard?

A. Along in 1933. [73]

Q. You are acquainted with what is known as East Fork job, are you not?      A. Yes sir.

Q. What was that job?

A. Job of clearing dam site and reservoir site for *bring* water in the—

Q. When I told the jury that was Flint Creek I was mistaken, was I not?

A. Rock Creek—the water is brought into Flint Creek.

Q. Did you ever have any conversation with Mr. Jim Barnard with respect to the work to be done on this project?      A. Yes sir.



(Testimony of Ernest Maehl.)

Q. When did you first talk with Mr. Jim Barnard about that?

A. In the fall of 1935 they was going——

Mr. Toole: Just a minute, that is objected to as not responsive.

Mr. Smith: I asked him when they first had a conversation.

Mr. Toole: That is right, in the fall of 1935.

Mr. Smith: Now then will you give us the substance of the conversation that you had with Jim Barnard at that time?

A. He come to me in Philipsburg one day and asked me—and wanted me to take my truck and go out and so we went out and looked the timber over and he asked me what I would clear the timber for. I told him \$100.00 an acre and him to carry the overhead.

Q. Was anything said at that time about what the term overhead meant?

Mr. Toole: Just a minute, he asked you what he said.

Q. I didn't ask you what you think the term means, I asked you if anything was said. [74]

A. It was, yes.

Mr. Toole: Just a minute, if you Honor please, I object to any questions about what was supposed to have been said in respect to overhead as not within the issues and not pleaded.

Mr. Smith: Just tell us Mr. Maehl, what Mr. Barnard said and what you said.

(Testimony of Ernest Maehl.)

A. He asked me what I was going to clear it for and I said \$100.00 and he could put in his bid according to that.

Q. Now then you were to clear it for \$100.00. What were you to furnish?

Mr. Toole: Now just a minute,—objected to as calling for a conclusion.

The Court: You will have to confine your statements to the conversations between the parties.

Mr. Smith: Was anything said at that time between you and Mr. Barnard with respect to Workmen's Compensation?

A. No, not just the compensation . . . it is the general overhead.

Q. Well did you talk about compensation among other things?      A. No.

Q. What did you talk about?

A. Well, just the general overhead expense, office expense and that I was to have \$100.00 for the work.

Q. Did you have any conversations between you in which the term overhead was explained or defined?      A. No, not that I know of.

Q. Was anything done at that time, Mr. Maehl, with respect to going ahead with the clearing or any further—

A. No, they didn't get the contract at that time— [75]

Mr. Toole: I move that all of the testimony up to this time be stricken as immaterial, incompetent

(Testimony of Ernest Maehl.)

and as not tending to prove the making of the contract alleged in the complaint and as too remote.

Mr. Smith: I may say in that connection, your Honor, that it does because the later evidence will show that this conversation was incorporated in a later conversation.

Mr. Toole: If your Honor, please, then it couldn't have possibly been part of a later agreement.

Mr. Smith: The later agreement was oral. I think what the evidence will show is that at the time of the later agreement they referred back to the former agreement and agreed that the land should be cleared according to that agreement.

Mr. Toole: Well, it is objected to upon the ground that an agreement cannot be made to relate back to any former agreement. Motion to strike is renewed upon same ground.

The Court: Overruled upon the promise of counsel to connect the matter up later. If that connection is not made you may renew the motion.

Mr. Toole: Note the exception.

Mr. Smith: Well of course, your Honor, we can't put all of the evidence in in one sentence.

The Court: That is true. The witness has testified that because of the fact that the defendant didn't get the contract there was no contract admitted at that time.

Mr. Smith: At a later time there was an agreement made upon the terms discussed during the first talk.

(Testimony of Ernest Maehl.)

The Court: Strike the last question.

Mr. Smith: Mr. Maehl, after you talked with Mr. Jim Barnard as you have just related to us, did you at a later [76] time have a conversation with him involving the same subject matter?

A. Yes sir.

Q. And where did that conversation take place?

A. On West Fork of Rock Creek.

Q. Approximately what time?

A. About the 23rd of June or 24th,—I don't know the exact date.

Q. What year was that?

A. Nineteen hundred thirty-six.

Q. And what were you doing out on the West Fork of Rock Creek?

A. I was putting in some concrete boxes for them and some metal bases.

Q. For whom?           A. Barnard-Curtiss.

Q. West Fork . . . that is not the same job as what we have called the East Fork?           A. No.

Q. Will you tell the Court and the jury what the second conversation that you had with Mr. Barnard was?

A. Jim Barnard come to me and we was just getting ready to run concrete and he said I am going to make another bid on this dam and he wanted to know if I would stay with my agreements same as I made before and I told him I would and he says there is three acres of grubbing which was not listed the first time. He wanted to know if I

(Testimony of Ernest Maehl.)

could go up and look it over once more and I told him I didn't think it was necessary and rather than go up I told him I would do the three acres regardless of cost. [77]

Q. Was anything said at that time about the price that was to be paid for the clearing?

A. Yes, I said I would clear the same for \$100.00 an acre.

Q. Did you at that time refer to the conversation which you had previously had with Mr. Barnard?

A. Yes sir.

Q. And what was said in that connection?

A. Wasn't anything said. I just took it that we would go ahead.

Mr. Toole: I move that the answer be stricken,—that nothing was said. I just took it that we would go ahead.

The Court: Denied. It may be important to the case.

Mr. Smith: Just tell us now if you can, what if anything was said about the conversation you had previously had.

A. Nothing more than that I would clear it at that price . . . same price as what we had talked over before.

Q. After your conversation with Mr. Barnard on that particular day what if anything did you then do?

A. Well, I stayed and run the concrete. He went down to Helena and bid on this job and he told me

(Testimony of Ernest Maehl.)

if he got the job he would call me, or his brother——

Q. Did you later see Mr. Jim Barnard or his brother?      A. Saw his brother.

Q. And what did his——

Mr. Toole: That is objected to. There is no proof as to *his* brother is.

Mr. Smith: Who is the brother?

A. Bob Barnard.

Q. Do you know whether or not he is an officer of the [78] company?

A. He was superintendent on the job there where I was working.

Q. Working where?

A. On the West Fork and East Fork both.

Q. Did he give orders and that type of thing on the West Fork?      A. Give me all the orders.

Q. Did he later work on the East Fork?

A. Yes sir.

Q. Did he give orders on that job?

A. Yes sir.

Q. Now, did you subsequently have a conversation with Mr. Bob Barnard about these matters?

Mr. Toole: Objected to for the reason that there is no proof that Bob Barnard had any authority to bind the corporation.

The Court: Aside from any questions involved as to whether or not he had any power to bind the corporation the witness has testified that Jim Barnard said that he would let him know. Now, if

(Testimony of Ernest Maehl.)

he did that either through Bob Barnard or through an office boy and Mr. Maehl went on the job that would certainly relate back to the contract and was just simply a method of communicating same as a letter or telegram would be. Well, of course you must prove the authority of Jim Barnard. That is a question of fact for the jury. Did he delegate his brother to act for him or speak for him. I am of the opinion that under the present condition of the record the objection is well taken and will be sustained. It should not be difficult to put the [79] officers of the defendant company on the stand.

Mr. Smith: May I withdraw this witness?

Witness Excused.

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### J. A. BARNARD

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

#### Direct Examination

By Mr. Russell Smith:

Q. Your name is Jim Barnard?

A. That is right.

Q. Are you an officer of the Barnard-Curtiss Company?      A. I am.

Q. And how long have you been an officer of that company?      A. Ever since its existence.

Q. What office do you hold?

(Testimony of J. A. Barnard.)

A. Secretary-Treasurer.

Q. Do you have a brother named Bob Barnard?

A. Yes sir.

Q. And is Bob Barnard employed by the company?      A. He is.

Q. And was he in 1936?      A. He was.

Q. What capacity did he have with the company at that time?      A. Superintendent.

Q. And as superintendent what were his duties with respect to the various jobs that the company had?

A. He was general superintendent directing the work.

Q. And as general superintendent did he have control of [80] the work which was being done?

A. Yes.

Q. Did he have authority from the company to enter into contracts and sub-contracts?

A. Not ordinarily.

Q. Who generally made the contracts with the sub-contractors?      A. I did.

Q. You handled that yourself?      A. Yes sir.

Q. Who was the president of the company?

A. M. W. Barnard.

Q. Another brother?      A. My father.

Q. And did your brother Bob Barnard have any position with the company other than general superintendent?      A. No sir.

Q. Did you and your brother Bob work together on these various construction jobs?



(Testimony of J. A. Barnard.)

A. I can't answer the question unless I would know——

Q. Let's be a little more specific . . . about the East Fork of Rock Creek job . . . what capacity did you act in?      A. Bob was under my direction.

Q. He was under your direction?      A. Yes.

Q. Did you give him any directions with respect to Mr. Maehl's work on the dam job?

Mr. Toole: That is objected to as immaterial until the contract is proven.

The Court: Overruled. [81]

Mr. Toole: Note an exception.

A. I think I did.

Q. And did you at any time advise your brother Bob to tell Mr. Maehl that you had secured a contract on that East Fork job from the State Water Board?

A. I don't know as I ever gave him that specific information.

Q. Well, did you speak with him about it at all?

A. Yes.

Q. What was the substance of that conversation?

Mr. Toole: Objected to as having no bearing upon the evidence of a contract between Barnard-Curtiss and Maehl.

The Court: It may have a bearing upon the authority to enter into it. Objection overruled.

A. I think the first direction I gave Bob on this job was to have Ernest Maehl go up on the damsite clearing and get it started quickly.

(Testimony of J. A. Barnard.)

Mr. Smith: You may be excused unless Mr. Toole—

### Cross Examination

By Mr. Toole:

Q. When you referred to the dams site job what did you mean by that—what does that expression refer to?

A. Dams site clearing and grubbing was a distinctly separate part of the job . . . was bid by us separately and was a separate piece of work.

Q. And how big a clearing job was the dam?

A. It is my recollection that it was seven and some tenths acres more or less.

Q. And eventually did it turn out to be less than that?

A. It turned out to be something less. [82]

Q. And you told Bob to tell Mr. Maehl to go up and get started on the clearing on the dams site?

A. That is right. Under the provisions of our contract we had to start the dam and we wanted to get it started.

Q. And so that statement that you gave with reference to the instruction to Bob Barnard were to tell Maehl to go up and get started clearing the dams site consisting of 6.98 acres?

A. Eventually it turned out to be that, yes sir.

Mr. Toole: Well, I move that all of the testimony of this witness on direct examination be stricken in that it does not tend to prove any con-

(Testimony of J. A. Barnard.)

tract between Barnard-Curtiss Company and Maehl.

The Court: This refers to the instructions given by the witness to his brother that has not been touched on. Motion to strike denied.

Mr. Toole. With exception.

Mr. Smith: That is all, Mr. Barnard.

Witness Excused.

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ERNEST MAEHL,

the plaintiff, was recalled and testified as follows:

Direct Examination  
(continued)

By Mr. Russell Smith:

Q. Did you have a conversation with Bob Barnard? A. Yes to some extent.

Q. What did he tell you?

A. He told me one day that he had the contract and to go up and clear the damsite before I built the camp. [83]

Q. And after that conversation what did you do?

A. I got through with the concrete work on West Fork and went up and started clearing the reservoir site.

Mr. Toole: I move that the last part be stricken, the reservoir site, the proof being that Barnard

(Testimony of Ernest Maehl.)

told him to start on the damsite which was only 6.98 acres.

Mr. Smith: Well, your Honor, this witness has testified that he had a conversation with Mr. Jim Barnard in which it was agreed that he should clear the reservoir site for \$100.00 an acre. Now then if nothing further was said about it and if he did actually clear the reservoir site for \$100.00 that would amount to a contract and upon performance he would be——

The Court: Yes, upon direction of someone in authority to do it, or if the defendant saw him in the course of the work and made no objection to his doing it, and accepted it as having been done.

Mr. Smith: So that as a matter of proof we have to show what was done and who was present and that type of thing and we think what he did was material if for nothing else than to show an acceptance of the performance by the other party.

The Court: Well as I gather, the condition as related by Jim Barnard as a witness here was that he told his brother Bob to go to the clearing of the damsite and get it started quickly. Is that included in the 118 acres?

Mr. Smith: Yes, the plaintiff has testified that at the time of his conversation Mr. Jim Barnard mentioned the grubbing of the damsite and that he said he would do that free gratis, I think he said if he got the contract on the 118 acres, and at any rate

(Testimony of Ernest Maehl.)

there is no question that the damsite was a part of the construction job. [84]

The Court: Motion is denied.

Mr. Toole: Note the exception.

Q. How many men were working upon the 118 acre tract which was to be cleared?

Mr. Toole: That is objected to upon the ground that there is no contract or evidence as to its existence or proof of performance is immaterial in that no sufficient proof of the existence of the contract has yet been made as to the 118 acres.

The Court: Sustained on the theory that how many men were working is unimportant. The question is,—was the contract made,—the price agreed upon,—the work done.

Mr. Smith: Did you employ a crew of men prior to the time that you went to the East Fork of Rock Creek?

Mr. Toole: Same objection in that there is no proof.

The Court: Well, I suppose now that counsel is proceeding upon the theory that if there be no contract made nevertheless a crew of men was employed to do the work and put upon the job and defendant accepted the benefit.

Mr. Toole: Further objection is made that the complaint in this action is based upon a contract and not upon quantum meruit.

The Court: Well, there is such a thing as an implied contract as I understand the law.

(Testimony of Ernest Maehl.)

Mr. Smith: It is our understanding, your Honor, that an acceptance——

Mr. Toole: Further objection is made that there is no sufficient evidence of competent proof of a performance.

The Court: Objection overruled.

Mr. Toole: Exception. [85]

Mr. Smith: Read the question, please.

Question read.

A. Yes sir.

Q. And what did you do with that crew of men after they were employed?

A. Well the crew we had on the concrete I took them up.

Q. And what did those men do?

A. They cleared the ground.

Q. What was the first thing that you did after you got to the scene of the operation, what was the first physical act done?

Mr. Toole: May it be understood, your Honor, that the objection to all of this evidence is made on the ground that the plaintiff has not proven a contract and that the proof of a performance is immaterial.

The Court: It may be so understood and that each and every part of the testimony now going in is subject to the objection and exception heretofore made by the attorney for the defense.

Mr. Smith: What we mean by that is what did your men first do?

A. They cleared the actual damsite.

(Testimony of Ernest Maehl.)

Q. Now then you speak of the dams site, Mr. Maehl, what do you refer to?

A. Where the dam is actually built on.

Q. Now is there any difference in the type of clearing on the place where the dam actually sets than on the reservoir site?

A. Yes, everything had to be taken off, stumps and everything so they could strip the top soil.

[86]

Q. How many acres were involved in the dams site proper, do you recall?

A. I think it was listed at seven acres at that time.

Q. Do you know how many acres were actually grubbed?

A. Six and ninety-eight hundredths, I think.

Q. After your men completed the grubbing on the dams site then what did they do?

A. They kept on clearing—going ahead on the reservoir site.

Mr. Toole: Now I want the objection made as to any testimony made as to the reservoir site, upon the ground that the plaintiff has not proven any contract with Barnard-Curtiss for clearing the reservoir site and upon the further ground that the proofs put in by Mr. Barnard were that the construction was limited to clearing the dams site. Mr. Barnard of course—

The Court: Objection will be overruled.

Mr. Toole: Note the exception.

(Testimony of Ernest Maehl.)

The Court: As I understand it the dams site was the portion actually covered by the dam, is that right? And the reservoir site is the upstream land that was cleared and expected to be filled with water. Very well, let the record so show. Proceed.

Mr. Smith: Mr. Maehl, were the men whom you hired paid during the time that you were working on the dams site or the reservoir? A. Yes sir.

Q. How were they paid?

A. By check by Barnard-Curtiss.

Q. And what was your practice with respect to indicating [87] the amount that the men should receive in payment?

A. The Water Board had a scale they handed me to take up there so——

Q. Yes, but how did Barnard-Curtiss know how many days or hours——

A. I kept the time on them and took it to West Fork.

Q. And who was in charge of the West Fork Camp at that time? A. Bob Barnard.

Q. Do you know whether or not it was upon the basis of the time sheets handed in by you that the checks were made? A. Yes sir.

Q. Was your practice with respect to the payment of the men the same after you finished the actual dams site proper as it was after your men started on the clearing of what we decided to call the reservoir site?

Mr. Toole: Objected to as immaterial.



(Testimony of Ernest Maehl.)

The Court: Overruled.

Mr. Toole: Note an exception.

Mr. Smith: How long, Mr. Maehl, were you actually physically present at the time of the clearing of the dam and reservoir sites?

A. From the 24th day of August to the 9th day of November.

Q. And what happened on the 9th of November?

A. I got the flu and an abcess in my ear and got sick.

Q. Where did you go?

A. Murray Hospital.

Q. And how long were you in the Murray Hospital?      A. Eighteen days.

Q. And what did you do with respect to the clearing crew at the time you went to the hospital?

[88]

A. I had Cleve Metcalf in charge of the crew.

Mr. Toole: Objected to as immaterial.

Mr. Smith: Well, he was in the hospital. I want to show what was done and how it was done while he was gone.

The Court: Objection overruled.

Mr. Toole: Exception.

Mr. Smith: Who is Cleve Metcalf, Mr. Maehl?

A. He had been around the job.

Q. And was he employed by you in connection with the West Fork project,—or I mean the East Fork?      A. Yes, he was.

Q. And in what capacity was he employed?

(Testimony of Ernest Maehl.)

A. He came there on the 7th of October——

Mr. Toole: Now just a minute, we don't want conversations between Metcalf——

Mr. Smith: Don't tell us what Mr. Metcalf and you said but what did you do with respect to Mr. Metcalf after he got on the job?

A. Put him in charge of the clearing crew.

Q. And was he in charge of the clearing crew at the time you went to the hospital?

A. Yes sir.

Q. Was he in charge of the clearing crew while you were in the hospital?      A. Yes sir.

Q. After you got out,—strike that—how much land had been cleared up until the time you went to the hospital, Mr. Maehl?

A. About 50 acres.

Q. And how much land had been cleared by the time,—by the 9th, I think you said, when Mr. Metcalf came on the job? [89]

A. Oh, maybe four—five acres outside of the actual damsite.

Q. That four—five acres would be on the reservoir site would it not?      A. Yes sir.

Q. When did you return to the East Fork, Mr. Maehl?

A. I went back to work on the 28th of December.

Q. On the 28th of December?      A. Yes sir.

Q. And at the time that you got back how much——      A. At that time?

Q. When you came back from the hospital?

(Testimony of Ernest Maehl.)

A. Well, I should judge about 90 acres.

Q. You would say roughly 90?

A. Between 80—90 somewhere.

Q. And when was the final clearing completed on this particular tract?

Mr. Toole: Which tract?

Mr. Smith: The 118 acre tract.

A. January 15.

Q. During all of this time while you were on the job were the time reports made to the Barnard-Curtiss Company in the same fashion?

A. Yes sir.

Q. And during your absence do you know how Barnard-Curtiss kept time on the various men working for you?

A. I think Mr. Metcalf turned the time in every night.

Q. You weren't there of course and can't testify about that?      A. No.

Q. Now did you buy any tools or implements for use in [90] clearing and grubbing this land?

A. Yes, I bought them all.

Q. What kind of tools?

A. Axes, cant-hooks and some saws.

Q. Did the men employed by you use that equipment?      A. Yes.

Q. Did they use it so far as you know during the whole time of the clearing?      A. Yes sir.

(Testimony of Ernest Maehl.)

Q. How much did . . . you kept a time book all the time you were on the job?      A. Yes sir.

Q. You have that time book with you?

A. Yes sir.

Q. Now was the time book kept from day to day?      A. Yes sir.

Q. And how did you make your entries as to the amount of time each man worked?

A. Marked down every night what hours they worked certain days.

Q. And was that your uniform practice with respect to your time book?      A. Yes sir.

Q. And do you have that book with you now?

A. Yes sir.

Q. Can you refer to your book, Mr. Maehl, and tell us how much time your men worked during the period that you were actually keeping the time?

A. Up as far as when I was sick?

Q. Well, the periods that you were keeping time, —I wish [91] you would tell us how much.

The Witness: (Referring to time book) Well, we started on August 24 and I kept all the time then up to October 16.

Q. And what was the total amount of time that you kept during that period of time?

A. Well, there might be some of that time that Metcalf was keeping, part of the time, and turning it in, and I don't know just what date that was when he started.

(Testimony of Ernest Maehl.)

Q. How much time does your record show was turned in on the 118 acre clearing job?

A. My total time was for 512.

Mr. Toole: I think, your Honor, he is testifying now from a memorandum which is not the time book itself.

Q. You made that computation from the time book?      A. Yes sir, figured it out.

Mr. Smith: Of course I should be glad to let counsel have the time book so that he could check the computation.

Mr. Toole: Where is the time book?

The Witness: Oh, it's right here.

Mr. Smith: What was that figure you gave us, Mr. Maehl?

A. The total time amounted to \$512 and some cents up to the middle of September when——

Q. \$512.00?      A. Yes.

Q. In making that computation would you take the hours?      A. Yes sir.

Q. And you multiplied that by the rate per hour per man?      A. Yes.

Q. Some of the men were employed at slightly different [92] wages than others?

A. Not at that time except myself.

Q. Included in that figure you have included the time that you yourself worked on the job?

A. Yes sir.

Q. That is from August 24 to October 16, is it, the figure you gave us?      A. September.

(Testimony of Ernest Maehl.)

Q. Yes, August until September 16.

A. We started building the camp.

Q. After Mr. Metcalf came on the job who then kept the time for the clearing crew?

A. Mr. Metcalf.

Q. And was it his time book that the checks of Barnard-Curtiss were made upon?

Mr. Toole: Well, that is objected to unless he knows.

The Court: The rule, of course is, Mr. Maehl, that you can testify only to what you know, not what was told you.

A. Well, it wasn't told me but it was the system.

Q. Did you ever see him hand his time in?

A. Yes sir.

Q. And you know that the men were paid, do you not?      A. Yes.

Q. Do you know whether or not Barnard-Curtiss had anybody employed by Barnard-Curtiss out keeping time?

A. They did later on,—along the latter part of September—first of October—they put a time-keeper on.

Q. And was he keeping time on this 118 acre job?      A. Yes sir.

Q. But up until that time they had no one keeping the time? [93]

A. No, only myself.

Q. During the time that you were engaged in clearing the dam site and the reservoir site did any

(Testimony of Ernest Maehl.)

one else, so far as you know, furnish any materials, equipment or supplies for the work that was being done?      A. Not that I know of.

Q. Did you keep the time, Mr. Maehl, from December 28 when you came back to the job until January 15 when it was completed?

A. No, Mr. Metcalf.

Q. Mr. Metcalf kept the time. At the time the 118 acres was cleared was it cleared in the ordinary and usual manner of clearing land?

A. Yes sir.

Q. Was any objection ever made to you by anyone that the dam site was not properly cleared?

Mr. Toole: That's immaterial. I move that the answer to the question just before it be stricken.

The Court: Overruled. Motion to strike denied.

Mr. Toole: Exception.

A. No sir.

Q. And was any objection ever made to you by anyone that the reservoir site was not properly cleared?

Mr. Toole: Same objection.

The Court: Overruled.

Mr. Toole: Exception.

A. No sir.

Q. Were you acquainted with the work that was being done there from the time that it started until the time the water was actually turned into the dam? [94]      A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Was any work ever done in clearing or grubbing this particular 118 acres other than the work done by your men?      A. No sir.

Q. You have testified, Mr. Maehl, that your men did some grubbing on the dam site, is that right?

A. Yes sir.

Q. Now in addition to the grubbing that was done on the dam site proper was any other grubbing done by your men during the course of this construction?      A. Yes sir.

Q. Will you tell us what if any conversation you had with Mr. Barnard with respect to this other grubbing?

A. He come to me one morning——

Q. Now just a minute, he,—who do you mean by he?

A. Jim Barnard, and said there was some more grubbing to be done that we hadn't figured on,—that we had to grub a borrow pit.

Q. What is a borrow pit?

A. Borrow the gravel and dirt that they put in the dam.

Q. All right, go on.

A. He wanted me to go ahead and grub that too. Mr. Toole: Just what he said.

A. He said for me to go ahead and grub the borrow pit.

Q. Was any definite figure set as to the price to be paid?



(Testimony of Ernest Maehl.)

A. I think I estimated the grubbing at \$65.00 an acre.

Mr. Toole: Not responsive. I move it be stricken.

Q. Was anything said between you and Mr. Barnard at the time you were talking about the price to be paid for this [95] work?

A. Nothing more than he told me to go ahead and grub it.

Q. You have been engaged in lumbering business,—logging business for some time, have you?

A. Yes.

Q. And have you employed men to do logging and lumbering work for you?      A. Yes.

Q. Are you acquainted with the reasonable value for grubbing?      A. Yes sir.

Q. In your opinion, Mr. Maehl, as a man who has been engaged in logging and lumbering for many years, what would you say would be the reasonable value of clearing or grubbing per acre the acreage involved in this borrow pit?

Mr. Toole: That is objected to as not within the issues in this case. The allegation in the complaint is that the defendant and plaintiff made an agreement whereby the plaintiff agreed to grub the borrow pit amounting to 20 acres and that the defendant agreed to pay him \$65.00 an acre. Therefore, certainly one of the essential elements in any contract would be consideration and there could be no

(Testimony of Ernest Maehl.)

consideration without the meeting of the minds upon the price——

The Court: The agreement was that they were to pay a reasonable price for the work done.

Mr. Toole: ——not consistent with the pleading.

The Court: Well, I think there is no material variance here. I don't suppose you are really startled or surprised at this turn.

Mr. Toole: I am always startled. Objected to upon the ground the witness has not shown himself qualified and [96] competent.

The Court: He has been grubbing all his life. Objection overruled.

Mr. Smith: Will you answer the question?

A. \$65.00 an acre, I think is a very reasonable price.

Q. The land involved,—this land which you grubbed, was that a portion of the same land involved in the 118 acres?      A. Yes sir.

Q. And now tell the jury, if you will, the reason or the difference between the cleared land and the grubbed land insofar as this contract is concerned?

A. Clearing land—we just cut the timber and disposed of it,—burned it,—or any way. Grubbing means we had to take the stumps out so they could use this dirt to fill in the dam,—had to take all the stumps out and burn them.

Whereupon, at 12:00 o'clock noon, the jury was admonished by the judge and court was adjourned

(Testimony of Ernest Maehl.)

until 2:00 o'clock P. M. at which time the trial was resumed.

Mr. Smith: Will you take the stand again, Mr. Maehl?

Q. Mr. Maehl, you told us this morning that you had a conversation with Mr. Jim Barnard about the grubbing on this 20 acres, you recall that, do you?

A. Yes sir.

Q. When did that conversation take place?

A. Some time latter part of September.

Q. And where did the conversation take place?

A. I think we were standing on the dam site. I was there looking after the clearing crew.

Q. And at that time what was the clearing crew doing?

A. Cutting timber on the reservoir site. [97]

Q. And were they so cutting timber and so placed that Mr. Barnard could see them from the point where you were standing?

A. Yes sir.

Q. Do you remember at this time whether Mr. Barnard came out to the job after that time?

A. He come out there different times. I don't know if he was out in the timber or not, he was at the camp at different times.

Q. How long would he stay?

A. Sometimes over night, sometimes a day or two.

Q. Do you recall whether Mr. Barnard was there at any time after you returned from the hospital?

A. No, not Jim Barnard wasn't.

(Testimony of Ernest Maehl.)

Q. Who was there at that time?

A. A man by the name of Oscar Strickland.

Q. Did Mr. Barnard come out at all?

A. I don't think so,—not that I know of.

Q. Was Mr. Bob Barnard there at any time?

A. I think he left about two days after I come out of the hospital to come back on the job.

Q. Now, with reference again to the 20 acres that were grubbed, will you tell us how much money Barnard-Curtiss paid to you or to men engaged for hire by you on account of work done on that grubbing?

A. They just paid them the ordinary salary for the time they put in in the week, it all went in together, the grubbing and clearing.

Q. Well, what I am getting at is this, did Barnard-Curtiss pay anything to the men who were engaged in the clearing [98] or engaged in the grubbing for the work that they did in the grubbing itself?      A. Not that I know of.

Q. So far as you know nothing was paid on account of that work?

A. Not on the grubbing. It was all charged to the clearing.

Q. Those two jobs were going on simultaneously. I mean by that they were going on at the same time?      A. Same time.

Q. And the wages for the men who were grubbing was charged to the clearing part of the work?

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Mr. Maehl, you have been in the contracting business, have you?      A. Yes sir.

Q. Have you taken and made contracts for clearing of lands, and timber contracts, road contracts and that sort of thing?      A. Yes sir.

Q. State whether or not, if you know, the word "overhead" has any technical or special meaning as used by contractors engaged in various kinds of contracting in the State of Montana?

Mr. Toole: That is objected to as calling for a conclusion of the witness and upon the further ground that the witness has not shown himself to be qualified and that it invades the province of the jury.

Mr. Smith: The rule of evidence as we understand it is, your Honor, that in the interpretation of the contract [99] words are ordinarily taken in their usual and ordinary sense,—that if a word has a special or technical meaning that it is competent for anyone who knows the special meaning to tell what the word as used in that group means.

The Court: Yes, that is the rule but you are covering too much territory,—the question is the locality,—State of Montana is too broad.

Mr. Smith: Where has your contracting experience been had, Mr. Maehl?

A. Mostly timber land,—Missoula, Granite Counties, Ravalli County.

Q. Has any of it happened outside of the area of the counties you have mentioned?

(Testimony of Ernest Maehl.)

A. I didn't catch that.

Q. Have you done any contracting outside of Granite and Missoula Counties?

A. Yes, I have.

Q. Where was that?

A. Wisconsin and Michigan.

Q. Now, referring to the work that you have done in Granite County, Montana, I will ask you if the word "overhead" as used by contractors generally in Granite County, Montana, during the years 1936 and 1937 had any special meaning?

Mr. Toole: Same objection on the ground that he is not qualified,—has not shown that he has had sufficient experience to testify as to the meaning of the word.

The Court: Overruled.

Mr. Toole: Note an exception.

A. It has. [100]

Mr. Smith: And will you tell the Court and jury what that meaning is as used in the contracting business in Granite County?

Mr. Toole: Same objection.

The Court: Overruled.

Mr. Toole: Note an exception.

A. It means office expense, or putting up the payroll and all other bills, whatever price is agreed on, whatever expense is over the main contract price, the contractor carries that overhead expense, what he was supposed to clear the ground for.

(Testimony of Ernest Maehl.)

Mr. Toole: I move the whole answer be stricken as not responsive——

The Court: Overruled.

Mr. Toole: —vague and uncertain and the answer is not sufficiently definite to be of any information to the jury.

The Court: Denied.

Mr. Toole: Exception.

Mr. Smith: In the answer you say other bills and other expense, what is included, what do you mean?

Mr. Toole: Same exception.

The Court: Same ruling.

A. Well, if there is anything come up that they had to put extra men onto the payroll that would be their expense and not to me.

Mr. Toole: Move that the answer be stricken.

The Court: Denied.

Mr. Toole: Exception.

Mr. Smith: When you say take care of the payroll what [101] do you mean,—do you mean clerical expense and that sort of thing?      A. Yes.

Q. When you use the term “other expense and bills” do you have in mind Workmen’s Compensation?

Mr. Toole: Now, if your Honor please, the witness has been asked for his definition and given it.

The Court: I think we will let him do the testifying.

(Testimony of Ernest Maehl.)

Mr. Smith: The objection I take it is **sustained**.

The Court: Yes, it is. It is leading. Further, where in the pleading is there any suggestion of overhead?

Mr. Smith: There is no suggestion, your Honor. He said he had had a contract to do this work at \$100.00 an acre.

The Court: Pleading, first cause of action. I haven't read the pleading with the specific purpose to find a suggestion of overhead.

Mr. Smith: There is none, your Honor.

The Court: Is it of importance here?

Mr. Smith: He testified this morning that the contract was for \$100.00 an acre, the overhead to be borne by Barnard-Curtiss and I was trying to make it clear what the meaning of that term was.

The Court: Was there any objection to that part of the testimony?

Mr. Toole: Well, yes your Honor. I have definitely stated, I think, that the contract has been denied entirely. Of course the pleading in this case is that he made a special contract and it isn't based upon the quantum meruit. He cleared 118 acres,— he had been paid \$100.00 an acre; therefore that he has been paid so much and that he has a balance for so much. [102] Now the defense of course is that the contract was never made and naturally any payments or payrolls which were made by Barnard-Curtiss or payments made to Mr. Maehl are material under the pleading that he has received so much



(Testimony of Ernest Maehl.)

money and to the extent that that proof goes in I think it is proper under the pleading, but a contract in which he testifies that he had a contract for \$100.00 an acre and Barnard-Curtiss were to pay the overhead is a different one from that which is alleged in the complaint and to that extent it is not material.

The Court: Well, your position is clearly sound under the practice prior to the adoption of the new rules but under the new rules it is merely a question of trying to get the facts before the jury.

Mr. Toole: I agree with the Court and with counsel that it is material that this jury should know whether payments were made in the form of overhead and how they were made.

The Court: Well, there isn't any suggestion of overhead. In Paragraph IV, the first cause of action, it is alleged that plaintiff performed each and all of the terms and conditions of said agreement and the defendant promised and agreed to pay the plaintiff therefor \$100.00 for each and all of the 118 acres, amounting to \$11,800.00, and that said work, labor and clearing was reasonably worth said sum. You say you haven't challenged that. That the defendant has not paid the same or any part thereof except the sum of \$8,360.30. I will ask counsel to furnish me sometime between now and Monday morning the testimony with reference to overhead, the objections made and the ruling there-

(Testimony of Ernest Maehl.)

on. It appears to me at the moment that it is not within the issue.

Mr. Smith: It may be, your Honor, that I have been [103] anticipating something that would probably be part of the rebuttal on our part.

The Court: That may be true, but upon the other hand the Court has ruled. If I decide from a reading of the transcript of the record that I am in error I want to be in a position to correct that error.

Mr. Toole: I think the Court should have our position clear that we have denied that any such contract was made but of course the evidence here is that payrolls have been paid and that type of payment made and if the Court concludes that a contract was made then all of those items do become of course payments upon the contract whether they are called overhead or some other form. But it is our position that plaintiff is bound by his pleadings and that his proof must conform and that counsel is required to prove that that is the contract he made and that the allegation in the complaint does not prove that in addition to the \$100.00 an acre we should pay any overhead.

The Court: Under the pleading there is no mention of overhead. The pleading appears to allege a specific contract. The charge is \$100.00 for clearing the 118 acres. If they were cleared under an agreement then his statement that a certain sum of money has been paid upon the contract becomes

(Testimony of Ernest Maehl.)

material. As I interpret the pleading it means that whatever was paid under the agreement to pay \$100.00 an acre for clearing the 118 acres is not to be paid on overhead. However, we will proceed.

Mr. Smith: In the ordinary course of clearing land for dam site purposes, Mr. Maehl, what is done with the timber, with the trees which have been cut down? [104]

Mr. Toole: Well, the same objection, that it calls for a conclusion and it is not material.

The Court: He may show a common practice in the community which may be shown.

Mr. Toole: If your Honor please, I am anticipating that counsel now has another cause of action in the stulls in mind.

The Court: The plaintiff contends that he is to be paid a certain amount of money for doing a certain amount of work. Now counsel is proceeding upon the theory that the trees and brush were simply piled and burned. Now the third cause of action is based upon the theory that if that agreement has been made and if the defendant here requested the plaintiff to cut stulls from that timber which was on there that would be added work performed at the defendant's request and of a reasonable value of so much, so the Court will permit proof of what would be expected under a contract for cutting and grubbing.

Mr. Toole: Note the exception.

The Court: It will be noted. Proceed.

(Testimony of Ernest Maehl.)

Mr. Smith: What was the usual practice in Granite County during the years 1936 and 1937 with respect to the disposition of trees and brush during the performance of the clearing contract?

Mr. Toole: Now just a minute, this was a dam site.

The Court: Well, I don't suppose it makes much difference to us whether it was a dam site,—a mill site.

Mr. Toole: I think it does.

Mr. Smith: I will qualify the question by adding to that, on a dam site.

Mr. Toole: May I ask some questions? [105]

Mr. Smith: Yes.

Mr. Toole: Mr. Maehl, have you ever seen,—is there another dam in that county like this one?

A. No sir.

Q. Are there any in that vicinity?

A. No water conservation dams.

Q. Have you ever seen a dam in that part of the country built by the Water Conservation Board?

A. Not in Granite County.

Q. Have you seen one in any similar locality?

A. I seen one in Powell County.

Q. That the Nevada Creek dam? A. Yes.

Q. What was the timber like on that?

A. Very little clearing.

Q. Stand of timber was very light?

A. Yes.

(Testimony of Ernest Maehl.)

Mr. Toole: I object to the witness testifying as to custom.

Mr. Smith: Maybe I can go a little further. What, Mr. Maehl, is the purpose of clearing a dam site, if you know?

A. Keep the timber from getting in the irrigation canals.

Q. And in the actual construction of the earth filled dam is there any need for the saving of the timber or the valuable part of the trees?

Mr. Toole: Objected to as immaterial.

Mr. Smith: Well what I am getting at is this, the clearing of the dam site is just to get the trees out of there and getting them burned up so they are not in the dam site and the cutting and saving of the stulls is not an inci- [106] dental part of disposing of the timber.

The Court: Well, it is stated in the third cause of action that between a certain day of August, 1936, and January, 1937, and at the special instance and request of the defendant the plaintiff did cut, prepare for use and save for the defendant approximately 6000 stulls. That is the essential thing in that cause of action. It isn't a question of whether it was usual or not. The question is, did he cut,—agreement as to price,—reasonable value of the work done,—have payments been made?

Mr. Smith: I may suggest to the Court that I can't prove that by this witness.

(Testimony of Ernest Maehl.)

The Court: Well, I think it would be safe to stop examination along this line and make proof within the limits of the allegations.

Mr. Smith: Did you, Mr. Maehl, have any conversation with respect to these stulls with any of the officers of Barnard-Curtiss Company?

A. No.

Q. At the time Mr. Jim Barnard first spoke to you, you were working on the West Fork of Rock Creek? A. Yes sir.

Q. That was some kind of job entirely separate and apart from the East Fork job? A. Yes.

Q. I am now proceeding on the fourth cause of action. And where was the West Fork,—where was the job that was being done on the West Fork of Rock Creek?

A. Well, we call it Eagle Canyon. It is down by the part of Rock Creek joining the East Fork to the West Fork. [107]

Q. And how far is that from Philipsburg, Montana? A. Twenty-three miles.

Q. Twenty-three miles. What kind of work were you doing there at that time?

A. Concrete work.

Q. And were you then working under contract?

A. No.

Q. Did you have any conversation with any of the officers of the defendant company with respect to transporting men to and from work?

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. And with which officer did you have that conversation?      A. Bob Barnard.

Q. What was Bob Barnard doing at the West Fork job at that time?      A. Superintending it.

Q. And was he in general charge of the work?

A. Yes sir.

Q. And will you relate to us the substance of that conversation?

Mr. Toole: Well, I object to that on the ground that Bob Barnard had no right——

Mr. Smith: I believe, your Honor——

The Court: He would have the right to contract for anything necessary to carry on the work in which he was engaged. As I view the law, upon the showing that he was the general superintendent in charge of the work he could order certain things that were done to carry on the work within those limits.

A. He come in town one day and asked me to get some men [108] and put in that concrete for them and transport some men back and forth from Philipsburg.

Q. How many men did you get and transport to and from the job?      A. Five.

Q. What, if anything, was said between you and Bob Barnard at the time of this conversation about payment?

A. He said he would pay me for the use of my truck and gasoline.

Q. Did he say how much he would pay you?

(Testimony of Ernest Maehl.)

A. No, he didn't.

Q. Did you, after that conversation, transport certain men to and from the West Fork job to Philipsburg?      A. Yes sir.

Q. What period of time?      A. Forty days.

Q. And how many men on an average would you transport each day?      A. Five.

Q. What work were those men performing on the job?

A. Screening gravel and helping out in concrete.

Q. Do you have a record of the mileage that you made during the time that you were hauling these men?      A. Yes sir.

Q. And how did you make up that record?

A. I figured mileage,—what it was from town out to the job and back, and the number of days that we traveled back and forth.

Q. And then did you make a charge?

A. Yes sir. [109]

Q. And how much per mile did you charge?

A. Eight cents.

Q. And is eight cents a mile a reasonable price for hauling five men?      A. I think so.

Q. In the truck you were using?

A. Yes sir.

Q. How much was the total which you estimated at eight cents per mile for the work in hauling these men back and forth?

A. I don't just remember offhand unless I look in the book.



(Testimony of Ernest Maehl.)

Q. Well, will you look in your book, please? Before you do that, Mr. Maehl, this is the same book that you had this morning,—your time book, kept by yourself? A. Yes sir.

Q. When did you make your entries in the book with respect to mileage?

A. When we got through with the job.

Q. You may go ahead.

A. (Witness referring to book) I don't think I got it in this book, I think I got it in another book.

The Court: What were the miles traveled?

A. Thirteen hundred and twenty miles as near as I remember without looking it up.

The Court: You know these are things of importance and the jury must have some basis upon which they could reach a verdict. Unless it is reasonably worth eight cents a mile, they are not in a position to know.

Mr. Smith: I think perhaps I can get it in another [110] way, your Honor.

A. I remember it being 1320 miles.

Q. It was 23 miles out to this job, was it?

A. Yes sir.

Q. And of course it would be 23 miles back?

A. Yes sir.

Q. Do you remember how many days you actually spent on this concrete work?

A. Forty days.

Q. Forty work days? A. Yes sir.

Q. Did you make a trip each day?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. That would be then,—your total mileage would be 40 times 45, is that correct?

A. Yes sir.

Q. That, your Honor, adds up to more miles than he has testified to and we have asked for in the complaint and if we waive any claim that we might have to any excess over any amount actually claimed——

The Court: 1840 miles at eight cents a mile.

Mr. Smith: The complaint is based on about 1300 miles and we have asked for that amount.

Q. Do you know where this other book is?

A. I got it at home.

Q. Would that book be available by Monday morning?

The Court: You are only permitted the amount set forth in the pleading. Well, proceed.

Mr. Smith: Now, with respect to the,—was any part of the amount earned in hauling men to and from the West Fork job [111] ever paid to you?

A. No sir.

Q. Now with respect to the fifth cause of action, did you have any conversation with any of the officers of the defendant company with respect to hauling men back and forth from Philipsburg to the East Fork job?      A. Yes sir.

Q. And with whom did you have that conversation?      A. Jim Barnard.

(Testimony of Ernest Maehl.)

Q. And approximately when did you have that conversation?

A. At the same time that he went to Helena to bid on this job.

Q. And what was said at that time?

A. He said for me to haul the men back and forth on the job until we got the camp built.

Q. And was anything said with respect to payment?      A. He said he would make it all right.

Q. He said he would make it all right. And in the building of this camp, did you have a contract to build the camp?      A. No sir.

Q. How were you doing such work as you did in building the camp?

Mr. Toole: That is objected to as immaterial.

The Court: Sustained.

Q. How many men were employed in building the camp?

Mr. Toole: Same objection.

Mr. Smith: I want to show how many men he did haul back and forth. We will withdraw that question. How many men did you transport for the defendant back and forth from Philipsburg? [112]

A. Five.

Q. And did you transport them in your truck?

A. Yes sir.

Q. And how much time, or how many days were these men engaged in working on the camp?

A. I transported them for 20 days. It took longer to build the camp.

(Testimony of Ernest Maehl.)

Q. That was actual working days, was it?

A. Yes.

Q. And how far is it from the camp site to Philipsburg?

A. I think I got them two mileages mixed up I gave you. It is 23 miles to the dam.

Q. How far is it to the West Fork job?

A. Sixteen, I think.

Q. Sixteen to the West Fork and 23 to the East Fork?

A. Twenty-three to the East Fork.

Q. And you hauled these men back and forth then a total of 46 miles a day for 20 days, is that correct?

A. Yes sir.

Q. On what basis did you charge for your services in making this transportation?

A. Eight cents a mile.

Q. And is that a reasonable cost for operating a truck, hauling five men that distance?

Mr. Toole: Same objection.

The Court: Overruled. Well really, that is a question the jury is called upon to decide. The question as to whether eight cents a mile is reasonable on the West Fork is stricken and the jury is admonished to disregard it in determining the issues.

[113]

Mr. Smith: What kind of a truck were you operating?

A. Dodge.

Q. What kind of a Dodge, how big?

A. Half ton pickup.

(Testimony of Ernest Maehl.)

Q. What is the approximate mileage that is gotten from the gasoline in a truck of that kind?

Mr. Toole: That is objected to as calling for a conclusion.

Mr. Smith: Answer that question with respect to your own truck.

A. It varies very much. We had awful bad roads out to that dam. Takes pretty near again as much.

Q. How much gasoline,—how much mileage did you get going to and from the East Fork job, if you know?

A. About 16 miles as near as I know.

Q. To the gallon. And approximately what was the price of gasoline at that time?

A. Twenty-six cents.

Q. Twenty-six cents a gallon. And what was the approximate mileage you got on the West Fork job?      A. About 18.

Q. About 18 miles. And was the price of gasoline about the same?

A. About the same, varies sometimes.

Q. You were using your own truck on this work?      A. Yes.

Q. Approximately how long would it take you to make a trip?      A. About an hour.

Q. Would you pick up the men at their home and leave [114] them at their home?

A. Yes sir.

The Court: Was that hour the round trip or one way?      A. One way.

(Testimony of Ernest Maehl.)

The Court: That is, it would take you two hours to make the round trip.

A. Two hours to make the round trip.

The Court: Proceed.

Mr. Smith: Did you,—this is with respect to the sixth cause of action,—did you perform some services, Mr. Maehl, in building camp on the job at the East Fork?      A. Yes sir.

Q. At whose request did you perform those services?      A. Jim Barnard's.

Q. And was anything said as to the rate at which you were to be paid?      A. No, there wasn't.

Q. What is the going rate in,—what was the going rate in Granite County at that time for foreman of camp building crews?

A. \$1.20 an hour.

Q. How many hours, if you know, did you work in building camp?

A. I couldn't just say without adding it up again.

Q. Have you looked at your time book?

A. Yes.

Q. Have you got it in your time book?

A. Yes.

Q. Well, will you take out your time book and tell us?

A. Total time I built my camp, 423 hours. [115]

Q. Now you have taken that figure I notice from that sheet of paper. You made that computation on

(Testimony of Ernest Maehl.)

a sheet of paper but the figures were taken out of the book.

Mr. Toole: Is that the same time book?

A. Same.

Mr. Smith: And between what dates did you work on the camp?

A. Between September 7 up till practically November 9.

Q. In what year?

A. Nineteen hundred thirty-six.

Q. How much were you paid for the work performed by you as superintendent of the camp?

A. Eighty-five cents an hour.

Q. And you have not been paid anything in excess of that?      A. No.

Q. This is with respect to the seventh cause of action. When you first came to the job on the East Fork, Mr. Maehl, did you bring with you certain tools and appliances?      A. Yes sir.

Q. And can you tell us generally what those tools were?

A. Axes and saws and cant-hooks and chains and wedges and different tools to use in cutting timber.

Q. Do you have any itemization as to what tools you had?      A. Yes sir.

Q. Where do you have that?

A. In this book.

Q. Will you get that out and tell us just exactly what tools you took on the job?

(Testimony of Ernest Maehl.)

A. I didn't take them all at one time.

Q. Do you have a complete record there of what you did take? [116]

A. Yes sir.

Q. You kept the book with respect to these tools then the same as with respect to these other items. Now, just tell us what tools you took.

A. I took six axes and a couple of saws and some wedges, three or four wedges to start with, and then kept adding to them.

Q. Do you have a record of what you added to them?

A. Yes sir. Then I kept buying axes as I went along.

Q. Did you make a record of the axes you bought?

A. Yes sir.

Q. Just tell us what that was.

A. Sixteen axes to start with.

Q. Sixteen axes all told?

A. Yes, at that time.

Q. Sixteen axes to start with?

A. Not all the first day, but before we started much clearing I had sixteen axes.

Q. And did you bring any more axes?

A. Several times.

Q. How many did you bring?

A. Several times I brought four and once I brought two.

Q. Now is that all the axes you brought on the job?

A. Yes.

Q. What other tools did you bring?



(Testimony of Ernest Maehl.)

The Court: Did he say brought or bought?

Mr. Smith: Now you have testified about the axes. Will you go on as quickly as you can and tell us about the other tools you took out there?

A. Two cant-hooks, two chains, two single jacks and one [117] chain wrench.

Q. All right, go ahead. Is that all?

A. That's all, I think.

Q. That is all you have a record of?

A. That is all I have a record of.

Q. What did you do with the tools you took out there?

A. Turned them over to Barnard-Curtiss.

Q. When did you do that?

A. The 15th of March.

Q. To whom did you give them?

A. Oscar Strickland.

Q. And that was the 15th of March, 1937?

A. Yes sir.

Q. And what was Oscar Strickland doing out there at that time?

A. He was superintendent there at that time.

Q. Was any other officer of the company out there other than Strickland that you know of?

A. Not at that time, I don't think.

Q. Was Strickland signing checks for the company?      A. Yes sir.

Q. And at the time that you left these tools there was Barnard-Curtiss engaged in other clearing work?      A. Yes sir.

(Testimony of Ernest Maehl.)

Q. And would the nature of that work require axes and saws and wedges and that type of thing?

A. It was clearing same as I was doing.

Q. What conversation did you have with Mr. Strickland with respect to these tools? Will you tell us what you and Mr. Strickland said? [118]

A. He said they would like to use the tools. He said they would finish and return them at that time. I said all right with me.

Q. Did you make any record of the tools which were left with Mr. Strickland? A. Yes sir.

Q. Do you have that record?

A. I thought I had it all in this book but I have it in the other. 29 axes, two cant-books, three saws and what few wedges and single jacks we had.

Q. Where is that other book? A. At home.

Q. Do you have any itemization any place of the reasonable value of these tools at that time?

A. Well, they were practically as good as new, in good shape.

Q. Has anything ever been paid to you on account of the value of these tools? A. No sir.

Q. Have the tools ever been returned to you?

A. No sir.

Mr. Smith: At this time I may say that I am going to, with the Court and counsel's permission, ask this witness to bring the book that has,—this itemization book. And if agreeable I would like to put him on out of order Monday to prove this particular itemization.

(Testimony of Ernest Maehl.)

The Court: Very well, you can withdraw him at this time and replace him on the stand Monday morning.

Cross Examination

By Mr. Toole: [119]

Q. Mr. Maehl, when did you take the tools that you referred to, the two saws, the six axes, the three wedges and the other items referred to in the seventh cause of action out to the project?

A. 24th day of August.

Q. Of 1936? A. 1936.

Q. And then you said, if I understood you correctly, that you turned them over to Mr. Strickland, left them there with him? A. In March.

Q. In March, 1937? A. In 1937.

Q. And where had those tools been between August 24, 1936, and March of 1937?

A. Cutting timber with them.

Q. They had been in use out on the timber project? A. Yes.

Q. So they were second hand tools?

A. Yes, they were second hand.

Q. And what other tools besides those tools did you have out there? Do you know,—can you tell me?

A. I had 16 axes that I took out there and I had axes on another job,—15.

Q. Well, in addition to the tools that you referred to here, all of the tools that you have mentioned, what else,—what tools did you have on the job out there?

(Testimony of Ernest Maehl.)

A. Nothing, only axes, cant-hooks and chains.

Q. Well, how much equipment did you have besides that which is referred to in your complaint and in your testimony? [120]

A. I didn't have any.

Q. And the tools which you referred to as having been left with Mr. Strickland consisted of all of the tools that you ever had out on the clearing or grubbing?

A. Yes sir.

Q. Any horses? A. One horse.

Q. Now, as I understood you, Mr. Maehl, you said you had a conversation with Mr. Jim Barnard with respect to clearing the dam site and that conversation took place in 1935, is that right?

A. The first conversation.

Q. Where did you first meet Mr. Barnard?

A. First I ever met him I met him at Philipsburg.

Q. Was that at about that time?

A. No, several years before.

Q. You had met him previously? A. Yes.

Q. You worked for them on road work?

A. Yes.

Q. That road work was over on Rock Creek at that time? A. Yes sir.

Q. What were you doing over there,—foreman?

A. Foreman on the concrete work.

Q. And were you out on that job in 1935 when you first talked with Mr. Barnard about the clearing?

A. Job wasn't going then.

(Testimony of Ernest Maehl.)

Q. When you first talked with Mr. Barnard, where was that?      A. Philipsburg.

Q. In the town? [121]      A. Yes.

Q. Had you previously been working on the road job?      A. Not on the West Fork.

Q. Had you previously been working on any job?      A. Georgetown Hill.

Q. For Barnard-Curtiss?      A. Yes sir.

Q. In fact, you are a concrete foreman as well as a logger?      A. Yes.

Q. Have you worked for other contractors as foreman?      A. Yes sir.

Q. You worked for Barnard-Curtiss as foreman on the West Fork job?

A. Just building camp and concrete work.

Q. Out on the road?      A. Yes.

Q. In Philipsburg, as I understand it, you met Mr. Barnard and discussed the dam job for the first time in 1935?      A. Yes sir.

Q. What time of the year was that?

A. In the fall of the year, about this time or a little later.

Q. What was said as nearly as you can tell us?

A. He came in the shop one morning and wanted to know if I would go out and give him an estimate.

Q. Do you have a shop in Philipsburg?

A. Yes sir.

Q. Carpenter shop?      A. Yes sir.

Q. Is it open now and running? [122]

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Have you been operating a carpenter shop while the dam was being built? A. Yes sir.

Q. Some men employed there?

A. Sometimes.

Q. So that while you were contracting, as you say, out on the dam job you were also running a carpenter shop in Philipsburg?

A. Not working at that time. He asked me to go out to East Fork with him. I took my truck, went out and looked the timber over.

Q. Were you on the site of the project?

A. Yes.

Q. No work was being done? A. No.

Q. Where were you standing?

A. Upper end of the project.

Q. What then was the conversation?

A. He wanted to know what I would clear it for. I told him.

Q. You said,—on your direct examination you referred to the dam site and reservoir site. The reservoir and dam were combined. And what did you say?

A. I would do the clearing for \$100.00 an acre.

Q. And then what did you do, drive back to Philipsburg? A. Yes sir.

Q. As I understand, Mr. Maehl, the Montana Water Board advertised the Philipsburg dam,—the Rock Creek dam,—and Barnard-Curtiss were not low bidders? [123] A. Not the first time.

(Testimony of Ernest Maehl.)

Q. When the job was advertised by the Water Board the low bidder was another contractor?

A. Yes sir.

Q. And that low bid was made by the Inland Construction Company?      A. Yes sir.

Q. After your conversation with Mr. Barnard?

A. Yes sir.

Q. So that when you first talked with Jim Barnard, Barnard-Curtiss Company didn't have any contract for the construction of the Philipsburg dam, did they?      A. No sir.

Q. And then what happened? Did Inland Construction Company give up or refuse to go ahead for some reason?

A. Well, I guess it was delayed so long that——

Q. In 1936?      A. In 1936.

Q. A year later, is that right?

A. About a year later.

Q. And then did you talk with Mr. Barnard again?      A. Yes sir.

Q. And what was said at that time and where was it?

A. It was on the West Fork, on the concrete job we were working on.

Q. And you were out on the West Fork as a foreman?      A. Yes sir.

Q. Doing the concrete work for Barnard-Curtiss on a highway job?      A. Yes sir. [124]

Q. And he came out there?      A. Yes sir.

Q. What did he say?

(Testimony of Ernest Maehl.)

A. He wanted to know if I would stay with that bid I made on the clearing.

Q. And what else?

A. And he said as soon as he found out he had the bid he would notify me and he wanted the dam site cleared before anything else so we cleared the dam site.

Q. I am asking you now just about the conversation that took place out on the West Fork.

A. That was all then.

Q. That was all he said?

A. If I would take my bid that I give him the time before and do that clearing and I said I would stay with my bid.

Q. And that is all that was said?

A. Just as near as I remember.

Q. Then did Mr. Barnard leave there at that time?      A. Yes.

Q. And have you now told us everything that was said between you and J. A. Barnard with respect to the clearing of the reservoir and the dam site on the West Fork dam up to the time when you started to work clearing the dam site?

A. Well, he did say there was three acres of grubbing to be done on the dam site and wanted to know if I wanted to look at it and give him an estimate. It was hard to get away. I said I would rather do it for nothing so made the suggestion that I would do the three acres of grubbing without any extra charge.



(Testimony of Ernest Maehl.)

Q. Well, had anything been said in 1935 about the dam site? [125]           A. No sir.

Q. And so that in 1936 when you talked about the dam site you knew that there were some six or seven acres of it, did you, in the dam site?

A. Yes, I knew there was somewhere around seven acres.

Q. And Mr. Barnard said he wanted you to do that first, is that right?           A. Yes sir.

Q. And you said, well you would rather do the grubbing on the three acres for nothing than to go up and look at it?

A. Rather than lay the crew off.

Q. Was that all that was said between you and Mr. Barnard?           A. As near as I remember.

Q. So he did say to you, however, that he would let you know as soon as he got the job?

A. As soon as he got the job.

Q. Bob Barnard told you that Barnard-Curtiss had the job and told you to get on the dam site and get to work?           A. Yes sir.

Q. Now after you were told by Bob Barnard that they had the dam site,—that they had the contract,—you did move up there, and do you recall that Barnard-Curtiss Company—

Whereupon at 3:10 o'clock p. m., with the usual admonition to the jury, recess was had until 3:25 o'clock p. m. when the trial was resumed.

Q. Going back to the conversation when you were out on the West Fork on the road job, don't

(Testimony of Ernest Maehl.)

you recall that Mr. J. A. Barnard, that is Jim, said to you,—asked you if you would,—if you wanted to clear the reservoir site and that you said that you would, or words to that effect, and that he then [126] said,—or words to this effect,—there is about seven or seven and a half acres in the dam site that has to be cleared and grubbed, part of it has to be grubbed, and I want you to get at that first, and that it is a separate job from the other, that is to be done first and that is a separate item in our contract and the clearing of the reservoir site can come later?

A. He said something to that effect. He wanted the dam cleared so they could start the machinery as soon as they could.

Q. And you understood that the dam site was the place where the dam was to be built and that that was a separate item of clearing and grubbing, where there was grubbing, and had to be done first.

A. There was some grubbing on the dam.

Q. And you knew that that had to be done first and in your conversation with him that was referred to separately, was it not?

A. Not that I remember.

Q. Don't you recall that Mr. Barnard referred to the dam site as having about seven acres in it?

A. Yes, something like that.

Q. He did say that?           A. Yes, the dam.

Q. That had to be handled first?

A. He wanted that cleaned first.

(Testimony of Ernest Maehl.)

Q. And how long after that conversation were you engaged in the contract work out on the highway? A. Until the 23rd of August.

Q. Then did you move over to the East Fork on the dam? [127] A. Yes sir.

Q. What day did you go to work on the East Fork on the dam site?

A. The 24th day of August.

Q. You have your book there that shows that?

A. Yes sir.

Q. Will you find that in your book, please?

A. Yes sir.

Q. Do you have any other little piece of paper or memo in the book? A. Not now.

Q. There is nothing in there now that may get lost? A. No.

Q. And you have turned now to a page in your time book which,—does that show the time,—the time record of the day when you started on the dam site? A. Yes sir.

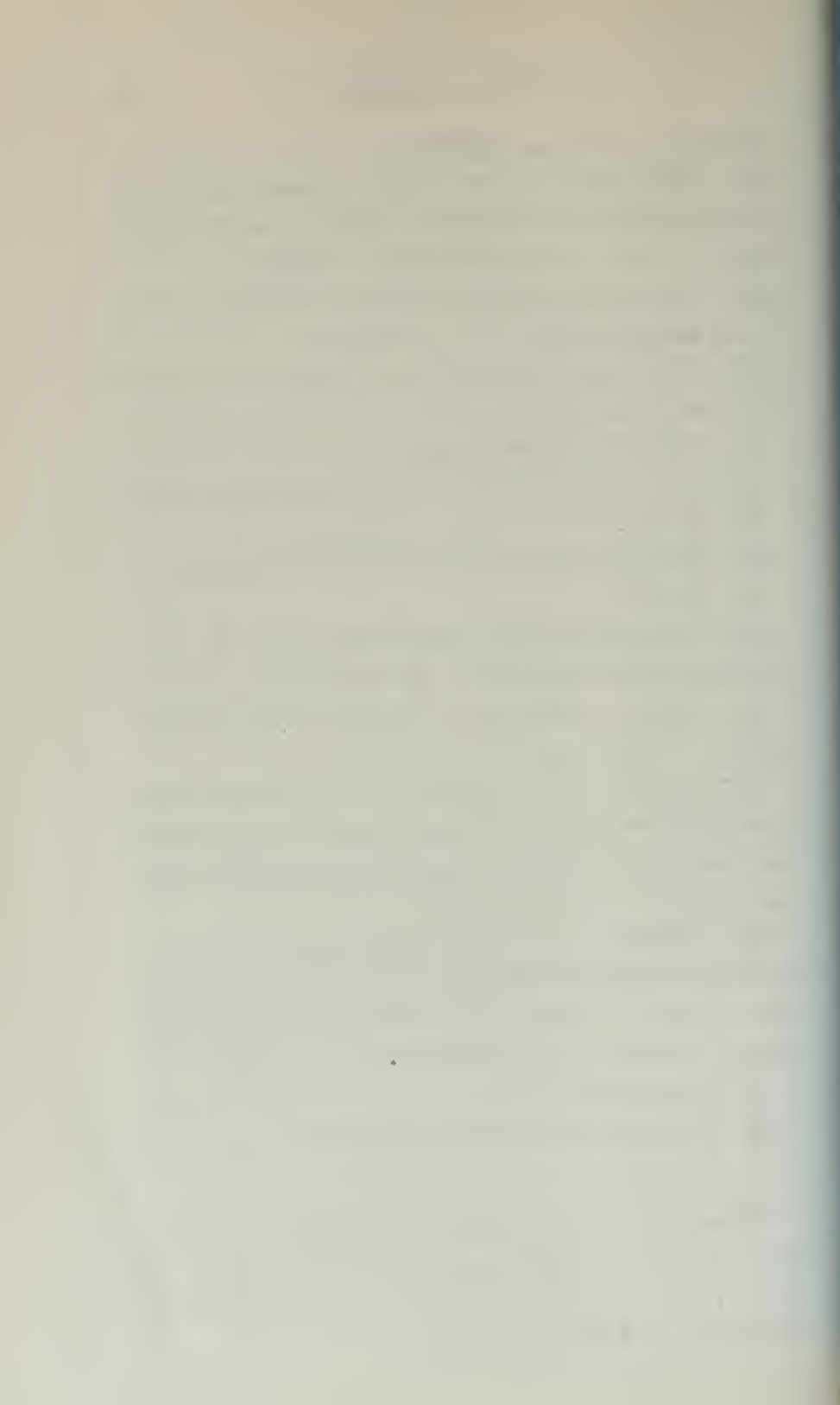
Q. I think I will have this marked, please. I notice on that page you have the names of the number of men,—are those the names of the men who went to work on the,—you tell me the date.

A. August 24.

Q. On August 24 on the dam site?

A. Yes sir.

Whereupon was received in evidence the Defendant's Exhibit 1, being page from time book, the same being identified as and marked Defendant's Exhibit 1, and being as follows:



DEFENDANT'S EXHIBIT 1 [128]

Barnard Curtis                      On Dam Site  
 TIME BOOK FOR THE MONTH AUG 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total time	Rate Pday	Amount \$ Cts		
H. Cunningham.....																									8	8	8	8		8	8	48		28.80		
James Maehl.....																									8	8	8	8	8		8	8	48		28.80	
Mont Shauder.....																									8	8	8	8	8		8	8	48		28.8-	
Glen Bailey.....																									8	8	8	8	8		8	8	48	320	28.80	
Ernest Maehl.....																									8	8	8	8	8		8	8	48		40.80	
Ray Piper.....																											8	8	8	8		8	40		24.00	
Frank Williams.....																											8	8	8	8		8	40		24.00	
Sep 1936.....																																			204.00	
H. Cunningham.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8	7½		36.00			
James Maehl.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8	9		43.20			
Mont Shauder.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8	7½		36.00			
Glen Bailey.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8	10½		50.40			
Ray Piper.....	8	8	8	8				8	8	8	8		8	8	8	8	8			8	8	8	8	8				8	8	8	9½		45.60			
Frank Williams.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8			8	8	8		8	8		8	8	8	8	7½		36.00			
Ernest Maehl.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	9		61.20		
Evens.....														8	6																		3		08.40	
Cat.....														8	6							8	6		2	8							5		13.40	
H Gerry.....																		8	8	8	8	8	8	8				8	8	8	x			25.00		
H Redman.....																		8															x	5		58.40
B Hattis.....																		8	8	8	8	8	8	8			8	8	8	8	x					
E Dixon.....																			8	8	8	8	8	8			8	8	8	8	x					
T Hubabcka.....																														8	x					



(Testimony of Ernest Maehl.)

Q. Now you just take it, Mr. Maehl. That book appears to be a regular time book generally used on work of that kind? A. Yes sir.

Q. Is it the kind of a time book that you were accustomed to use on work you were on where you were keeping time as a foreman.

A. Sometimes I kept it.

Q. Isn't it a fact that the practice on all Barnard-Curtiss jobs was to have the foreman keep a record of the time? A. Yes sir.

Q. Had all of the foremen do that?

A. Yes sir.

Q. And incidentally is the time on the road job in that book, too? A. Yes sir.

Q. And your practice was to list the number of men in the column provided for that and the days of the week and the number of hours per day and at the end you would list the pay or the amount, is that so? A. Yes sir.

Q. Now is that in your handwriting?

A. Yes sir.

Q. Will you open it at that page that was introduced there, look and see if you find Ernest Maehl there, it is there is it? A. Yes sir.

Q. And is that you? A. Yes sir.

Q. In your handwriting? A. Yes sir.

Q. And you worked a certain number of days from August 24 to what? [130]

A. To the end of August.

(Testimony of Ernest Maehl.)

Q. To the end of August, and you put opposite your name \$40.80. Was that right?

A. Yes sir, that's correct.

Q. So that you yourself kept the time and put down \$40.80. What is that, 85 cents an hour?

A. I think so.

Q. And you put that down yourself for your own time on the dam, is that so, clearing the dam?

A. I am mistaken there. That time is for the week ending,—there is one day over,—goes on to the next week.

Q. I don't think I understand that exactly.

A. Here is five,—maybe I can explain that. There is five days the first week that we worked.

Q. Yes.

A. Which made 40 hours. But that other day in August don't go in on that week. It goes in on the next week, in September. I turned the time in every Sunday to the company.

Q. Does the \$40.80 represent 85 cents an hour for each hour that is shown on the time book there?

A. No, not for all the hours shown on there.

Q. Does it, what does it represent,—what is that \$40.80?

A. For that first few days up to the first Saturday or Friday night,—see if I can find a piece of paper, it figures for five days.

Q. Forty hours at 85 cents an hour?



(Testimony of Ernest Maehl.)

A. Only 80 cents an hour. That was what they agreed to give me as far as the clearing was concerned. That is, carried me on the payroll at that figure.

Q. When was that agreement made? [131]

A. In the West Fork office some time.

Q. Would that have been made at the same time when Mr. Barnard was out on the West Fork?

A. No, that was after they got the contract.

Q. How long afterwards?

A. I should say along about the first of August.

Q. And when did you say the conversation was on the West Fork?      A. In June some time.

Q. So that along about the first of August you had an agreement with them that they would carry you on the payroll at 80 cents an hour?

A. I thought it was 85 as near as I can remember. It is so long ago.

Q. It was 85 cents wasn't it, Mr. Maehl?

A. That is what I thought.

Q. So that when you went out on the dam to go to work you put your own name in the time book just as you did all the other men and you carried the other men at certain scales of pay lower than yourself?      A. Yes sir.

Q. What were the other men getting?

A. Sixty cents.

Q. What was 60 cents?

A. Scale set by the Water Board.

(Testimony of Ernest Maehl.)

Q. Was 85 cents an hour the foreman scale?

A. Intermediate.

Q. So you carried yourself on your own time book at an intermediate labor scale while you were doing the work on the dam, did you? [132]

A. Yes sir.

Q. And at the end of each week, or two weeks, were you paid by Barnard-Curtiss?

A. Yes sir.

Q. And you were paid at 85 cents per hour?

A. Either 80 or 85.

Q. Now as a matter of fact, Mr. Maehl, didn't you get what would be called straight time? I am just asking now, if you didn't for instance work there as a foreman and get straight time which would amount to \$1.19 or 20 cents an hour for 40 hours a week? A. No sir.

Q. Tell me, or do you remember,—just take your book there,—do you have some other weeks in there,—take these pages following the one on August 24.

A. September is next. September, 1936, starts right here.

Q. Did you,—there is a page here marked on dam site August, 1936, on the right hand side of the book, and on the left hand side is a page that has marked on it Defendant's Exhibit 1.

A. August is up here,—September starts down here.

(Testimony of Ernest Maehl.)

Q. I see, all right, taking both pages,—the first, or the upper half of the pages is for August and the lower half is for September. And do you find your own name carried through in September?

A. Yes sir.

Q. In the same way that all of the other men were carried through and were you paid at the rate shown and the amount shown at the edge of the book?

A. Yes sir. [133]

Q. In other words, \$61.20 in September?

A. Yes sir.

Q. For the number of days shown on the book?

A. Well, this don't all,—some of that goes on to the camp building,—part of the time I worked——

Q. When did you go down to work on the camp?

A. I think I got that separate,—here on a separate page,—started to work on the camp on the 11th day of September.

Q. And you went to work on the dam site on the 24th of August and then on the 11th of September you went to work at the camp. Is that right? And you continued to carry yourself on the time book at 80 or 85 cents an hour after you went down to work on the camp?

A. I didn't carry myself at all but they paid me.

Q. But you wrote that.

A. I just turned the time in to the office.

Q. Now, did you say that you were a foreman when you were working on the camp construction?

(Testimony of Ernest Maehl.)

A. I had charge of it.

Q. And when you were on the dam, however, you claim that you were a contractor. Is that right?

A. Yes sir.

Q. So you were contracting,—you were the contractor on the clearing of the dam from August 24 to September what?      A. Eleventh.

Q. Eleventh, and then you went as a foreman on construction of camp from September 11th, and how long were you there?

A. Off and on until November 9. [134]

Q. And when you say, off and on, where were you when you were off?

A. Sometimes on the clearing.

Q. And when you went up to the clearing did you show you were working on the clearing?

A. Yes sir.

Q. What happened on November 9?

A. I got sick.

Q. You got sick, so that the total amount of time that you spent there was from August 24 on the dam site to September 17, is that right? On the dam site, September 11, I beg your pardon, and then from September 11 to November 9 you were building camp and off and on you were back up at the dam, is that right?      A. Yes sir.

Q. During all of that time you were being paid 85 cents an hour, or 80 cents, whichever it happens to be. I don't know myself. I think it is 85. You were being paid 85 cents an hour?

(Testimony of Ernest Maehl.)

A. I think so.

Q. You were paid that and you took the money each week, a check from Barnard-Curtiss Company. Now don't you remember that on August 20 you went up there as a laborer at 60 cents an hour?

A. I don't remember.

Q. This is a paper that is marked Defendant's Exhibit 2. Does that bear your signature?

A. Yes, but I think it was changed after that.

Q. Yes?           A. They made a mistake on that.

[135]

Q. That is your signature, isn't it?    A. Yes.

Q. That is what is called an assignment slip of the Works Progress Administration, is that so?

A. Yes.

Q. Is that one of those slips that contractor furnishes the National Reemployment Service when a man goes to work on that job?

A. The Reemployment furnishes to the men.

Q. And that particular one marked Exhibit 2 bears your signature, as I understand you.

A. Yes sir.

Q. Now, I am handing you a paper marked Defendant's Exhibit 3 and I will ask you if that is what is called a re-classification slip by the National Reemployment Service?

A. I never saw that one before.

Q. I understand. Are you able to identify it as the kind of a slip that was used out there?

(Testimony of Ernest Maehl.)

A. I never saw one of them out there.

Mr. Toole: Then I will only offer Defendant's Exhibit 2 at this time.

Mr. Smith: No objection.

The instrument referred to was thereupon, without objection, received in evidence, identified as and marked Defendant's Exhibit 2, read to the jury, and being as follows:

DEFENDANT'S EXHIBIT 2 [136]

ASSIGNMENT SLIP—WORKS PROGRAM

Non Vet

(Not Transferable)

Employee's name Ernest Maehl

Identification No. 3120-116

Address Philipsburg, Montana.

Date August 20, 1936.

Previously assigned to works program

project Yes ( ) No (x)

Certified from relief rolls ( )

Case No.

Relief district

Nonrelief person (x)

Age 58 Male (x) Female ( )

The person named above is to report ready for work at 8 A. M. P. M. on Aug. 24, 1936 as a Laborer (occupation) Code at 60¢ (Rate of pay) per hour (month) on project No.....PWA 1009R.U-3 of the Barnard Curtis Co., (Operating

(Testimony of Ernest Maehl.)  
agency) Req. No. 1 at Rock Creek (Location of  
project—city or village and county) Granite Co., to  
R. W. Barnard (Name of foreman or supervisor)

I Hereby Certify that I am the person named  
above as employee.

ERNEST MAEHL (Signature of worker)

(1

Signed Copy  
to Pay Roll  
Unit)

Penalties are provided for illegal signature, trans-  
fer or use of form.

Foreman or supervisor

ERNEST MAEHL  
(Signature)

Assignment official

.....  
(Signature) [137]

Mr. Toole. I will read that, if I may. This is  
called an assignment slip.

Q. So you signed that slip, Mr. Maehl, on the  
20th of August to go out on the work as a laborer  
at 60 cents an hour? A. I did.

Q. And that was not correct, was it? That was  
a mistake? A. It was.

Q. Didn't you have a conversation either with  
Mr. Strickland or Bob Barnard about that?

(Testimony of Ernest Maehl.)

A. I had it with Bob Barnard at the time I told him that was wrong. I told him it was 85 cents.

Q. Now I am handing you Defendant's Exhibit 3 and I am asking you if that isn't the reclassification slip by which that was readjusted?

A. I never seen that before. I never got it re-adjusted.

Q. But you did then get the 85 cents per hour?

A. I got the 85 cents.

Q. So that from your own information the adjustment was made and you went upon the Barnard-Curtiss payroll at 85 cents an hour and that adjustment was made between the 20th of August and early in September some time?

A. I don't know just when it was made.

Q. Was it made almost immediately after you got out on the job?      A. Shortly after, yes.

Q. And I want to see that time book once again just for a minute. I don't know that we marked all of the pages in here that we should have. You were out there until November 9 before you became ill?

[138]

A. Yes sir.

Q. Will you point out the pages where you kept the time until November 9? I took that clip off.

A. You maybe don't understand this here, but I marked the camp time over here, but I carried the men's time straight through here, so 7½ days



(Testimony of Ernest Maehl.)

here and the balance here, so that I wouldn't get mixed up on account of the men's time, and worked up through October and that is October yet too up to the 9th of November.

Q. And I think I would like to have all the pages between the page marked Defendant's Exhibit 1 and down to that page marked if I may. Yes, they all should go in. Now will you take this again,—I notice on the top of the page of August 24 you have the words "on dam site."

A. Yes sir.

Q. Then you kept over at the back a separate account on camp?           A. Yes sir.

Q. You have any pages in there marked reservoir site?

A. That was all dam site clearing and reservoir both.

Q. You don't have any pages marked reservoir site?           A. It is kind of mixed up here.

Q. Were you working for Applegate?

A. No, I had a crew.

Q. Did you have a contract over there,—where was that?           A. On East Fork of Rock Creek.

Q. Could you tell us what days you were over there?           A. I wasn't over there at all.

Q. Did you go over?

A. I went over to start it along about the 20th of August. [139]

Q. Who was Applegate, another contractor?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. You have no page in there marked reservoir site?  
A. It was all in one thing.

Q. Now I just asked you, you have no page in there marked reservoir site?  
A. No sir.

Q. Then you received your pay checks promptly did you at the end of each week?

A. Middle of the next week about.

Q. You would make your payroll up on a Saturday?

A. I turned the time in on Sunday, got the checks about Wednesday.

Q. You and all of the men working on the dam site were paid about Wednesday of each week for the work done the previous week?  
A. Yes sir.

Q. And that continued from August 24 to November 9?

A. No until they got their office built at the dam. We turned the time in every night then to the time-keeper.

Q. When were you paid?

A. About the middle of the week.

Q. From August 24 until November 9 you did receive your pay each week?  
A. Yes.

Q. While you were working on the dam site and while you were working on the camp. And that pay was received by you about the middle of the week for the past week?  
A. Yes.

Q. And you yourself were paid at the rate of 80 or 85 cents [140] an hour?  
A. Yes sir.

(Testimony of Ernest Maehl.)

Q. And the balance of the men at 60 cents. That right?      A. Yes.

Q. Then you went to the hospital, I believe you said?      A. Yes.

Q. Butte?      A. Yes.

Q. How long were you there, Mr. Maehl?

A. Sixteen days, I think, I was in the hospital.

Q. When did you come back on to the work?

A. Twenty-eighth day of December.

Q. What had been done,—how much of the work had been done in clearing the dam site when you left there to go down to build the camp?

A. The dam was all clear, the damsite itself was all clear.

Q. The 6.98 acres of the dam site was all cleared. And what date was that?

A. When we finished clearing?

Q. Yes.

A. Well, we kept right on clearing until we got material to build camp.

Q. I am asking,—you were working on the dam site?      A. Dam and reservoir site.

Q. You were working on clearing and grubbing and you worked from August 24 until September 11?      A. Yes.

Q. Then you went down to build camp?

A. Yes. [141]

Q. How much of the dam site had been cleared and grubbed on September 11 when you went?

(Testimony of Ernest Maehl.)

A. It was all cleared.

Q. Then you stayed most of the time at the camp from September 11 until November 9?

A. Yes sir.

Q. Until you became ill? A. Yes sir.

Q. And then you came back on December 28?

A. Yes sir.

Q. How much clearing had been done?

A. Well, I should judge around about 70 acres.

Q. And that was on the dam site and most of the reservoir site, was it? A. Yes.

Q. Did you have a time book after,—when you came back?

A. I had it but I didn't keep no time then. Somebody else was keeping the time.

Q. Who was that? A. Cleve Metcalf.

Q. Did you go to work yourself?

A. No sir.

Q. Were you carried on the payrolls after you came back from the hospital? A. Yes sir.

Q. Did you go to work?

A. I went to work as a foreman, but I didn't work. I supervised the crew.

Q. Tell me a little more about what you were actually doing and where? [142]

A. Bossing the clearing crew.

Q. On the reservoir site? A. Yes.

Q. What was Metcalf doing,—was he bossing?

A. He had part of the crew.

(Testimony of Ernest Maehl.)

Q. Did you have two crews there? A. Yes.

Q. And then while you were bossing that crew were you being paid 85 cents an hour?

A. Yes sir.

Q. You accepted that pay? A. Yes sir.

Q. How long a time did that last?

A. Up until the 15th of January.

Q. And then what happened,—what happened then? A. We had the 118 acres cleared.

Q. So that you worked on the reservoir site from December 28 until January 15 at 85 cents an hour, received a check every week? A. Yes sir.

Q. You don't happen to remember whether you got another employment slip?

A. I didn't need any.

Q. And during the same time Metcalf was there, was he working on the reservoir site?

A. Yes sir.

Q. Did you and Metcalf have any disagreement of any kind? A. No sir.

Q. You didn't have a record of your time, you said you didn't. Can you tell us from memory whether you were paid [143] every work day?

A. Every day that I worked.

Q. And did you work regularly?

A. Outside of a day or two that I laid off. It was storming.

Q. In other words you put in the time same as the other men? A. Same as the other men.

(Testimony of Ernest Maehl.)

Q. After that what happened, Mr. Maehl? You said the 118 acres was cleared. Did you have any further conversation with Mr. Barnard then?

A. Yes.

Q. Did you have discussions with him with respect to a written contract?

Mr. Smith: We object to this, your Honor, as improper cross examination, outside the scope.

Q. After you finished the job on January 15 you continued up there to work, did you not?

A. Yes sir.

Q. What did you do?                   A. Clearing.

Q. In addition,—or outside of the 118 acres?

Mr. Smith: We object to that again as outside of the scope of cross examination.

Q. Now you said that you were paid on this 118 acres \$3439.70,—now wait, I am wrong,—\$8360.30. You didn't say that on your direct examination but you said that in your complaint. You have shown us a time book here that shows that you were paid some at 85 cents an hour. What were these other sums,—what was this payment of \$8360.30? [144]

A. My foreman give me the time, what I had on his total time and what time I had on my book which totalled up to that.

Q. Is that strictly labor?           A. Yes sir.

Q. And that is all of the labor on the job?

A. Yes sir.

Q. And that includes your own labor at 85 cents an hour?           A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Are there any other items of any kind in there excepting just that one thing?

A. I don't understand what you mean.

Q. I just wanted to find out if all of that is labor.

A. Yes, as near as I could figure it out.

Q. Then you testified also that you had some tools up there, your axes and wedges, saws, chains, I think you said there were two chains. What other equipment did you use up there on the clearing, if any?

A. Nothing outside of a horse.

Q. Were there any caterpillars or tractors or anything of that kind used there at all?

A. No.

Q. Just one horse?

A. One horse, part time two.

Q. Then I am to understand you, Mr. Maehl, that the entire job of clearing was done with axes and saws and that all of the trees were skidded with one horse?

A. Yes sir, part time we had two.

Q. And whose horse was it, by the way?

A. I ain't sure, Art Slater brought the horse up there. [145] I don't know whether it was his or not.

Q. Do you know who paid for the horse?

A. No sir.

Q. You didn't pay for it?

A. Not yet.

Q. Do you know whether Barnard-Curtiss paid for it?

A. I don't think so.

Q. Now I wish you would tell us as accurately as you can from any records that you have,—did

(Testimony of Ernest Maehl.)

you say that you had a book,—do you have that with you now,—would that have a list of your tools and equipment?      A. Yes.

Q. Can you tell us from memory what tools and equipment you used in this clearing?

A. Well, when we got through—

Q. No, I don't mean when you got through, I mean altogether.

A. I brought about 32 axes and chains and a couple of cant-hooks.

Q. How many chains?

A. I think two that I didn't get returned. I had three chains on the job.

Q. Three chains on the job altogether. And what else?      A. Wedges and single jacks.

Q. Wedges,—are they steel or iron?

A. Steel.

Q. How many of those did you have?

A. I took about a dozen out.

Q. About 12?

A. I guess I took more than that out,—I think I charged them with six when I had left,—when I got through. [146]

Q. I am not talking about tools that you charged.      A. Well, that is what we used.

Q. Twelve wedges?

A. Sometimes 12 and sometimes not any, if they lost them.

Q. What ever,—some saws?



(Testimony of Ernest Maehl.)

A. Cross-cut saws.

Q. How many of those?

A. Three is the most we ever used as far as I know.

Q. And what else?

A. That is all that I know of.

Q. Did you have any cant-hooks?

A. I told you I had two cant-hooks.

Q. Oh,—and how big a crew of men?

A. All the way from 20 to 30, sometimes more or less.

Q. And Barnard-Curtiss paid all those men,—you never paid any of the men?      A. No.

Q. Now you have here a claim for what you called grubbing the borrow pit. That you say was 20 acres. Where was that borrow pit located with respect to the other part of the work?

A. It was located on part of the clearing,—what we cleared.

Q. It was a part of the 118 acres?

A. Yes sir.

Q. When was the work of grubbing the borrow pit done?

A. Well, long about the middle of September we started on it.

Q. Where were you at that time?

A. I was out there in the woods. [147]

Q. Are you quite sure,—were you out there all the time?      A. Not all of the time, no.

(Testimony of Ernest Maehl.)

Q. Weren't you building camp?

A. Part of the time, yes.

Q. You were on the payroll here every day weren't you during that period?

A. Not every day.

Q. Practically every day?

A. Practically every day.

Q. And the work of grubbing out this so-called 20 acres. Was that down the center of the reservoir site? Where was it located?

A. I guess it would be the east side.

Q. And who was in charge of that work?

A. I was in charge when we started and Metcalf was in charge.

Q. How much of that had been accomplished or done when you went to the hospital?

A. It was practically all done,—it was all done when I went to the hospital.

Q. During that period of time you also were carried on the Barnard-Curtiss payroll at 85 cents an hour while you were there?      A. Yes sir.

Q. You said that you performed work, labor and services in getting out some stulls, when was that?

A. Latter part of December and first part of January.

Q. And your complaint says that was between the 24th day of August and the 17th day of January. Did the work of getting the stulls extend over all of that period? [148]

(Testimony of Ernest Maehl.)

A. Not over that period. It was mostly after I left there. We didn't save any stulls when I was there.

Q. So that when the stulls were gotten out you were not there?      A. On the last end of it.

Q. When you say the last end,—what do you mean?      A. The 118 acres.

Q. Were the stulls all gotten out while you were there?      A. All but about a couple thousand.

Q. Who got the stulls out?

A. The men that I had employed there.

Q. Was Metcalf the man,—

A. He was foreman.

Q. When you came back was Metcalf still getting out stulls and he got a few out after you came back?      A. Yes sir.

Q. And Barnard-Curtiss paid all the payrolls for that?      A. Not for getting out the stulls.

Q. They paid all the men who worked getting out the stulls?      A. Yes.

Q. You never paid anything,—not a cent as a matter of fact?      A. No.

Q. That is true with respect to this grubbing too, isn't it?      A. Yes sir.

Q. And was any machinery or heavy equipment used on any of that work?

A. I think we used a caterpillar about two or three shifts on it.

Q. Whose caterpillar was it?

A. Barnard and Curtiss. [149]

(Testimony of Ernest Maehl.)

Q. Who paid the driver?

A. Barnard and Curtiss.

Q. Who paid for the oil and gasoline?

A. Barnard and Curtiss.

Q. And then,—now with respect to hauling the men,—you said you had a conversation with Bob Barnard and he asked you to pick up some men in town and haul them out to the job?

A. Yes sir.

Q. At that time you were the foreman for them out there,—for Barnard and Curtiss?

A. After we started working,—concrete work.

Q. When you hauled the men out, I mean.

A. Yes sir.

Q. And you had a Dodge?           A. Yes sir.

Q. And what sort of a body?

A. Little pickup body.

Q. And at Bob Barnard's request you picked up these men in the morning at Philipsburg?

A. Yes sir.

Q. And hauled them out there in the morning and back at night?           A. Yes sir.

Q. You yourself were going out in your Dodge?

A. Not necessarily.

Q. Did you have any other means of going yourself?           A. I would have stayed at the camp.

Q. Do I understand then that you made special trips?           A. Yes sir.

Q. Did you come in especially to get these men?

(Testimony of Ernest Maehl.)

A. I live in Philipsburg, that is my home. It is 23 miles, rough roads. I wouldn't drive it——

Q. I understand you to say that Bob Barnard had asked you to pick them up?      A. Yes sir.

Q. Now, I am asking you if you made special trips to haul the men?      A. Not special.

Q. You came home yourself?      A. Yes.

Q. And as a matter of fact you would have come home every night?      A. No.

Q. Did Barnard-Curtiss have a camp out there?

A. Yes.

Q. Would the men stay in the camp?

A. Yes.

Q. Who were these men,——

A. Men that,——

Q. Friends of yours?

A. Oh, just working men.

Q. Well, name some of them.

A. Well, there was Ray Piper.

Q. Let's take Ray Piper. How long has he——

A. He didn't work on the concrete but there was men——

Q. Let's go back to Piper.

A. He wasn't on that.

Q. Was he one of the men that you hauled?

A. He wasn't hauled at no time. He camped out on the East Fork. [151]

Q. Who was one of the men that you hauled back and forth?      A. My son.

(Testimony of Ernest Maehl.)

Q. Live at home with you? A. Yes sir.

Q. How old is he? A. Twenty-three.

Q. He had worked for Barnard and Curtiss out there, had he? A. I don't think so.

Q. He was working at that time? A. Yes.

Q. You took him back and forth?

A. Yes sir.

Q. Did you do that for your own convenience or for Mr. Barnard's convenience?

A. For Mr. Barnard.

Q. Now, let me ask you, Mr. Maehl, if it isn't a fact that you wanted to haul your own son back and forth and have him at home? A. No.

Q. Who else?

A. Glen Berry,—man by the name of—

Q. Let's go back to Berry. Has he been a long time in Philipsburg?

A. Not so very long.

Q. How long? Q. Two—three years.

Q. Married man? A. No.

Q. Does he live in Philipsburg?

A. In the country. [152]

Q. Didn't he ask you to?

A. No, he didn't.

Q. And who else?

A. Man named Southern or Sutton.

Q. How long has he been in Philipsburg?

A. He worked for me a month or two.

Q. He worked for you? A. Yes.

(Testimony of Ernest Maehl.)

Q. But when you started to haul him back and forth he was a man that you knew?

A. He was working for me at the time.

Q. Family man?           A. I don't know.

Q. Living in Philipsburg?

A. About a month.

Q. Who else were you hauling?

A. Mr. Cunningham.

Q. Where does he live?

A. Where ever he got a job.

Q. Isn't it true, Mr. Maehl, that you were anxious and very willing to accommodate those men who wanted to come to town?

A. I just told them that they had to board in town.

Q. Is that also true of the men you hauled out to East Fork?           A. Yes.

Q. Same group you,——

A. Same group, yes.

Q. And you hauled them back and forth and you did that as an accommodation or at the request of Bob Barnard?           A. Yes.

Q. And you think it is worth about eight cents a mile? [153]

A. It is really worth more than that.

Q. Well, it is really worth something. As to the tools you used those tools for some months on your own work, or at least out there on the clearing work?           A. Yes.

(Testimony of Ernest Maehl.)

Q. And when that was done you left them with Mr. Strickland?      A. Yes sir.

Q. What did he say,—we will give you the reasonable value rather than return them, or what?

A. He said he would return them or give me the reasonable value.

Q. And you think they are worth about \$92.00, you say in your complaint.

A. Something about that.

Mr. Toole: I think that's all.

The Court: Very well, call the next witness.

Mr. Smith: I think I have a little rebuttal. Just a moment, Mr. Maehl, please.

#### Redirect Examination

By Mr. Russell Smith:

Q. Do you know, Mr. Maehl, what, if anything, the purpose was in paying you 85 cents an hour during the hours that you worked on the job?

Mr. Toole: That is objected to. The fact speaks for itself. It would call for a conclusion.

Mr. Smith: Well, the counsel went into that matter.

The Court: Overruled.

Mr. Toole: Note the exception.

A. I don't know any more than that they had to carry me on the payroll. That's all I know about it. [154]

Q. Did you ever have any conversation with Mr. Barnard about being carried on the payroll?



(Testimony of Ernest Maehl.)

A. They said they had to carry me on the payroll.

Q. And is that all you know about that?

A. That's all I know about that.

Q. Calling your attention to Defendant's Exhibit No. 2, I will ask you if the signature in the place on the line marked foreman or supervisor is your signature? A. Yes.

Q. In other words, your signature appears on this twice, does it? A. Yes.

Q. You kept time, Mr. Maehl, from August 24 until about what date?

A. Kept time on the men that I had working under me up until the 9th of November.

Q. Until the 9th of November and up until what time did you keep time on the clearing crew?

A. Up until the 7th of October.

Q. If it had not been for hauling these men back and forth to Philipsburg where would you yourself have stayed during the time that you did haul these men?

Mr. Toole: Objected to as immaterial.

The Court: Overruled.

Q. What would you have done if you had not been hauling these men back and forth to work?

Mr. Toole: Same objection.

The Court: Overruled.

A. We would have had to put up a tent or something and batch out there. [155]

(Testimony of Ernest Maehl.)

Mr. Smith: We would like to recall this witness later.

The Court: Very well, the witness is to step aside to be recalled Monday morning at 10:00 o'clock. Call the next witness.

Witness Excused.

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### BERNEY HENSOLT

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

#### Direct Examination

By Mr. Russell Smith:

Q. Will you please state your name, please.

A. Berney Hensolt.

Q. And where do you live?

A. Right at present my home is 60 miles northwest of Lewistown.

Q. Where were you employed in the years 1936, the last part of 1936 and early part of 1937?

A. Flint Creek dam.

Q. By whom?

A. Barnard-Curtiss Company.

Q. And in what capacity were you employed?

A. I was originally employed as a truck driver.

Q. How long at that?

A. Four hours. I did some engineering work.

Q. Have you had any experience in engineering.  
A. I have.

(Testimony of Berney Hensolt.)

Q. Have you studied? A. I have.

Q. What kind? [156]

A. Civil engineering.

Q. Where did you study that?

A. I went to college at Missoula one quarter, also studied through experience.

Q. What jobs?

A. I worked for the State Highway Department on road construction jobs, also worked for the Forest Service and the Bureau of Public Roads in Glacier Park.

Q. From the **experience** that you have had and from the study that you have had are you competent to measure ground? A. I think I am.

Q. Was part of your employment measuring acreage on the Flint Creek job? A. It was.

Q. Now, referring especially to the dam site and the reservoir site immediately in back of it, are you acquainted with Mr. Ernest Maehl?

A. Yes.

Q. And are you acquainted with Mr. Metcalf?

A. Yes.

Q. And did you measure the clearing done by the crew under Mr. Maehl and Mr. Metcalf?

A. Yes.

Q. And how much acreage was involved in that area? A. It was 118 acres.

Q. And did you make reports to Barnard-Curtiss of acreage from time to time? A. Yes.

(Testimony of Berney Hensolt.)

Q. And do you know what was done with those reports? [157]

A. The monthly reports that I made were turned in to the Water Board for their monthly estimates.

Mr. Smith: That is all.

### Cross Examination

By Mr. Toole:

Q. You said you measured the clearing and grubbing done by the crew under the direction of Maehl and Metcalf. Did you measure the area of the dam site?

A. No. The area of the dam site I didn't measure.

Q. And do you know how much acreage was in that from any other source?      A. Yes.

Q. And is the area of the dam site in the acreage that you said was 118 acres?      A. Yes.

Q. But you didn't measure that?

A. Not at that time.

Q. Have you measured it since?

A. I had access to the checking of the measurements.

Q. Of the Water Board?      A. Yes.

Q. The measurement in the dam site is 6.98 acres, isn't that right?      A. Yes.

Q. Now, the total area out there was how much, did you measure the total area of the clearing?

(Testimony of Berney Hensolt.)

A. Not the total area. I measured the total area of the clearing and also broken down into sections of the clearing.

Q. Do you know of any section of the clearing that the Water Board refers to as 6.98 acres? Have you seen the [158] Water Board record?

A. I don't remember that particular figure.

Q. Did you take the 118 acres, any part of it, from the Water Board records?

A. Part from the Water Board records.

Q. And not taken from your own?

A. Yes.

Q. Part not taken from your own?

A. Part not taken from my own.

Q. How much?

A. Ten per cent of a 35 acre tract where there was skid timber.

Q. How much of it did you measure yourself?

A. I measured 107 acres on the dam within the reservoir itself.

Q. You measured 107 acres in the reservoir?

A. Yes.

Q. And did that include the 6.98 acres in the dam site?      A. No.

Q. So that what you actually measured yourself was 107 acres?      A. Yes.

Q. The other evidence that you have given, or the statement that you have given as to the balance of it, now, 11 acres, is something that you picked up, in Helena some place?

(Testimony of Berney Hensolt.)

A. There is 81/100 of an acre on the outlet conduit that I figured. I didn't measure it but I figured it in the first place from the original cross-sections of that area. [159]

Q. Let me ask you this,—there is 107 acres out there that you yourself, from your own measurement, know was cleared by the crew under the direction of Metcalf and Maehl, is that right?

A. And then there was this skid timber that they cleared, but was not within the bounds of the surveying that I had done or within the boundaries of the survey.

Q. When you got 118 acres you were relying for a portion of that on the Water Board records?

A. Yes.

Mr. Toole: Well, I move that the evidence that he measured 118 acres be stricken. We deny that the 118 acres was cleared.

The Court: The testimony in regard to anything except the testimony concerning the 107 acres will be stricken. Proceed.

Mr. Toole: That's all.

The Court: Any redirect?

Mr. Smith: No redirect.

Witness Excused

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The Court: Call the next witness.

Mr. Smith: With the exception of the testimony to be given by Mr. Maehl when he is recalled with

respect to the tools and the value of them, the plaintiff has no further evidence at this time, your Honor. I ask that the count with respect to the stulls, that is Count number 3, I ask leave to dismiss that count.

The Court: Well, how about it. Let the record show [160] that by the agreement of the parties Count 3 is dismissed.

Whereupon at 4:40 p. m. the jury was admonished by the Court and court was adjourned until 10:00 o'clock Monday morning.



The trial of said cause was resumed at ten o'clock a. m. on Monday, October 16, 1939.

The Court: Number 1714, Ernest Maehl, plaintiff versus Barnard-Curtiss Company, a corporation, defendant. Proceed.

Mr. Russell Smith: Will you take the stand Mr. Maehl.

ERNEST MAEHL,

plaintiff, was recalled and testified as follows:

Redirect Examination

By Mr. Russell Smith:

Q. You are the same Ernest Maehl who testified here Saturday?      A. Yes sir.

Mr. Toole: May I interrupt?

Mr. Smith: Yes.

(Testimony of Ernest Maehl.)

Mr. Toole: If your Honor please, we have changed court reporters, unless the Court has some objection.

The Court: The Court has no objection to either one of them; I know Mr. Catlin and he is one of the most competent court reporters in Montana, in my opinion; I have no objection to the lady but I know nothing of her qualifications. Proceed.

Mr. Toole: I might say, your Honor, that Mrs. Moody is preparing the transcript for which you asked.

The Court: Yes, I will read that this morning and have it under consideration.

Q. Saturday, Mr. Maehl, you told us you had a book in which you had some definite record of the tools and equipment taken to the Barnard-Curtiss job; did you bring that book with you this morning? [162]

A. Yes sir.

Q. Will you take it out, please. Now Mr. Maehl I will ask you if the entries in that book so far as they relate to the tools and equipment were made in your own handwriting? A. Yes sir.

Q. And when were they made?

A. On the 23 of August 1936.

Q. Is that the time to which the entries relate?

A. Yes sir.

Q. Now will you look at your book and tell the Court and jury the equipment which was taken to the Barnard-Curtiss job by you? A. Yes sir.



(Testimony of Ernest Maehl.)

Q. Will you do that?

A. Read it off?

Q. Yes.

A. I took 16 axes, 2 canthooks, 6 wedges, 2 single jacks, 3 saw handles and 2 skidding chains.

The Court: Two what?

The Witness: Skidding chains.

The Court: Very well, go ahead.

The Witness: That's all.

The Court: Is that all?

The Witness: That's all I took at the time, yes.

Q. Now did you at any other time take any tools and equipment to the Barnard-Curtiss job?

A. I took more axes later on.

Q. You have a record of those?

A. Yes sir.

Q. Will you read that? [163]

Mr. Toole: It isn't within the issues; the only claim is 6 axes.

Mr. Smith: That's right; I wish to show that this relates to axes, your Honor, and I wish to show that other axes were taken and substituted from time to time for the originals, of the complement of axes that were taken; we are not claiming more than the 6 but they are replacements.

The Court: Well you have a right to show what was on the ground at the time he said he loaned the articles to the defendants; but I don't want to go into an accounting; in other words, how many

(Testimony of Ernest Maehl.)

he took at one time and how many he got or how many he brought out or how many were worn; what we would like to know is how many he had at the time he says he left them with Barnard-Curtiss Company, that is on the 23 day of August, 1936— paragraph 2 of your seventh cause of action.

Q. Now Mr. Maehl did you note in your book at the time the entry was made in there, the value of these articles?                   A. Yes sir.

Mr. Toole: Objected to as invading the province of the jury.

The Court: Well the real thing is what is the reasonable value on the market at the time and place.

Mr. Smith: Yes.

The Court: I think this is merely preliminary. Overruled.

Mr. Toole: Exception. Might I further object that the question calls for the conclusion of the witness upon the very issue which is before the jury.

The Court: Read the question. [164]

Q. (read by reporter) Now Mr. Maehl did you note in your book at the time the entry was made in there, the value of the articles?

The Court: It will be overruled.

Q. Will you go ahead now and tell us what your book shows as to the value of these articles?

The Court: Well now just a moment, that wasn't the question, the question was did he note that.

(Testimony of Ernest Maehl.)

Q. Well did you note that? A. Yes.

Q. And what is the basis of the value that you noted in the book?

Mr. Toole: Objected to for the same reason.

The Court: Overruled.

Mr. Toole: Exception.

A. That I paid for the axes?

Q. Well what is the basis upon which you get the figures you put in your book?

A. What I paid for the axes and the different tools.

Q. And now at the time that you bought will you read those figures?

Mr. Toole: This is what you paid for them Mr. Maehl?

The Witness: Yes sir.

Mr. Toole: May I ask a question?

Mr. Smith: Yes.

Q. (By Mr. Toole) Was the payment made at about the time the tools were bought or . . .

A. . . . At the time I bought them.

Q. (Mr. Toole) And were they bought some time previously and then used and then turned into Barnard-Curtiss, or were [165] they new?

A. They were new.

Mr. Toole: Oh, I see. There is no objection then.

A. 16 axes \$46.00; 2 canthooks \$6.00; 6 wedges \$1.00; 2 single jacks \$3.00; 3 saw handles \$1.50; 2 chains \$3.00.

(Testimony of Ernest Maehl.)

The Court: What do you mean by single jacks?

The Witness: Three-pound hammer; that is to drive wedges with.

Q. After you took these tools and equipment to the Barnard-Curtiss job were they used by you for some period of time?

A. Yes sir.

Q. And what have you to say, Mr. Maehl, as to the effect of the use which you gave these tools, upon their condition?

A. They were in good condition when I got through with them.

Q. And what do you say about canthooks, are they subject to much wear and tear by reason of use?

Mr. Toole: If your Honor please, I may be laboring under a misapprehension, but it now appears that he was a contractor and was using these tools; they must have been his tools and he couldn't very well have left them with Barnard-Curtiss now on the clearing job referred to.

Mr. Smith: That may be true.

Mr. Toole: Well now that is all right.

Mr. Smith: Will you read the question.

Q. (read by reporter) And what do you say about canthooks, are they subject to much wear and tear by reason of use?

A. No not very much.

Q. And what about the wedges?

(Testimony of Ernest Maehl.)

A. They don't wear much. [166]

Q. What about the single jacks?

A. There was practically no wear on them.

Q. And saw handles?

A. They don't wear much.

Q. And skidding chains?

A. Very little wear on them.

Q. At what time, Mr. Maehl, did you turn these articles that you have mentioned, over to Barnard-Curtiss?

A. Around the 15th of March.

Q. And will you tell us what value these articles had then?

Mr. Toole: That is objected to as calling for a conclusion and invading the province of the jury.

The Court: While I realize that that is one of the specific questions the jury will be called on to decide—the rule is he must state the facts from which they may draw a conclusion as to what the reasonable value was and the condition of the articles at the time they were delivered, whether they had been used during the interim between August, 1936, and March, 1937, and what similar articles could be purchased for *for* cash on the date in March, in the vicinity where the delivery is claimed to have been made on the date when they left the defendant's use. Sustained.

Q. Do you know, Mr. Maehl, the price for which these various tools could be bought by a fair buyer who didn't have to buy, from a fair seller who didn't

(Testimony of Ernest Maehl.)

have to sell, on about March 15th, in the vicinity of the West Fork—or the East Fork project in Granite County?

A. The price was practically the same as when I bought them.

Q. And was the condition of the articles such that there wouldn't be any appreciable change in the price that you paid [167] for them?

A. No because I replaced anything that was worn much.

Q. Will you tell the jury Mr. Maehl what if anything transpired with respect to a pair of chain tongs?

A. I loaned them a pair of chain tongs; they said they would return them when they got through with them, but I never got them back.

Q. Now did you use the chain tongs in your own work?      A. No.

Q. And about what time did you give these chain tongs to them or loan the chain tongs to them?

A. Along in September some time, 1936.

Q. And at that time what would a pair of chain tongs such as the pair you loaned them be reasonably worth in Granite County and in the neighborhood of the West Fork—or the East Fork job?

A. I paid \$12.00 for them but I only charged \$9.00; they had been used some.

Q. Would a pair of chain tongs of that character reasonably sell for \$9.00 at that time?

A. Yes sir.

(Testimony of Ernest Maehl.)

Q. Will you tell us what happened with respect to a log chain?

A. I lent them a log chain decking line 60 feet, one time, and they used it to pull a cat out of a mud hole, or something, broke it all to pieces, said they would replace it and buy me a new one.

Q. What sized log chain was this?

A. It was a steel tape chain, 60 feet of decking, what they use for decking logs with. [168]

Q. What would a log chain of that character bring between a fair buyer and a fair seller at about the time you gave it to them or loaned it to them in Granite County in the place where you gave it to them?

A. About \$12.00.

Mr. Toole: How much did you say?

The Witness: About \$12.00.

Q. How long a chain was that?

A. Sixty feet.

Q. Now Mr. Maehl were any of these chains or any of these tools and equipment ever returned?

A. No sir.

Q. To you? A. No sir.

#### Recross Examination

by Mr. Toole:

Q. Now Mr. Maehl as I understand you you left some tools with Barnard-Curtiss on the 23rd of March or thereabouts—at least made an entry in your book on the 23rd of August—said that you

(Testimony of Ernest Maehl.)

had left certain tools with them, and you put a certain value on those tools, is that right?

A. Yes sir.

Q. And where had the tools come from?

A. Out of the hardware store.

Q. But I mean when you took them down there had they been used in clearing?

A. Not at that time no.

Q. Had they ever been used on it?

A. Not these.

Q. Well did you just go to the hardware store and buy new [169] tools?           A. Yes sir.

Q. And take them up to Barnard-Curtiss Company?           A. Yes sir.

Q. And did you pay the hardware store or did Barnard-Curtiss pay for the tools?

A. I paid the cash for all of them that I used.

Q. Did they pay for some?

A. Later on I guess we did order some tools from Barnard and Curtiss.

Q. Isn't it a fact that Barnard and Curtiss bought the tools for all of the work that was done up there and also bought the tools that you used and that you took up also some of your own tools that became partly mixed up up there, and that when you left there you left them and that Oscar Strickland told you that you would be paid for them?

Mr. Smith: I think I will object to this question.



(Testimony of Ernest Maehl.)

The Court: I think it is a multiple question, you have included two or three questions in the one.

Q. You left them with Oscar Strickland?

A. Yes.

Q. Oscar Strickland told you that they would pay for them what the tools were worth?

A. Or return them.

Q. And that was never done? A. Yes.

Q. The tools were second hand after you had been using or they had been using them?

A. At that time they was.

Q. So that what you claim is the value of your [170] tools that were left there with Oscar Strickland? A. Yes.

Mr. Toole: Now may I ask this witness some questions I should have asked on the first cross examination, your Honor?

The Court: I will permit it.

Mr. Toole: I think I may have asked Mr. Maehl but I am not sure.

Q. Did you ever pay Mr. Metcalf, the man whom you said was your foreman, any payroll or pay him for working for you?

A. Not personally I didn't but through Barnard-Curtiss he was paid.

Q. That is, Barnard and Curtiss paid him . . .

A. . . . The same as the rest of the men.

Q. Paid him on their payroll?

A. Yes sir.

Q. Paid him with a pay check every week?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. Did you ever pay anyone employed on that job up there?      A. No sir.

Q. Barnard and Curtiss paid them all, did they?

A. Yes sir.

Q. Outside of the tools you referred to did you ever furnish any equipment on the job of clearing?

A. All that I got up there.

Q. You have referred to them as the tools?

A. Yes.

Q. So that the tools you have referred to are the things you furnished on what you say was 118 acres of clearing, and that's all that you ever paid for? [171]      A. Yes sir.

Q. And if any other equipment or payrolls were furnished that was paid by Barnard-Curtiss Company, is that right?      A. Yes sir.

Q. You stated that you first talked to Mr. Barnard with respect to clearing up there in 1935, is that right?      A. Yes sir.

Q. What time of the year was that?

A. Along about this time of year.

Q. And who was present—or where was it?

A. Up on the East Fork of Rock Creek.

Q. Did you go on to the proposed damsite and reservoir site and look at it?      A. Yes sir.

Q. And did you look at the damsite?

A. Yes sir.

Q. And who was present?

(Testimony of Ernest Maehl.)

A. Myself and Jim and Bob Barnard and Cleve Metcalf.

Q. Now isn't it a fact that in your discussion with Mr. Barnard that both you and Mr. Metcalf were asked by Mr. Barnard if you would take the clearing jointly, the two of you?

A. At that time, yes,

Q. What Mr. Barnard did was to—did he get you at Philipsburg? A. Yes sir.

Q. And did he then take you and Cleve Metcalf and Bob Barnard in his car— or your car—up to the site of the dam? A. In my truck.

Q. In your truck. And Cleve Metcalf was along, is that so? [172] A. Yes.

Q. When you got up there you walked over the site of the project and looked at the clearing, did you? A. Yes sir.

Q. The four of you? A. Yes.

Q. Bob Barnard and Cleve Metcalf and you and Jim Barnard? A. Yes sir.

Q. That is Jim sitting here and Bob sitting over there in the corner—and you looked at the site of the dam, the proposed site, did you?

A. Yes sir.

Q. And then at that time Mr. Jim Barnard proposed to you and Mr. Metcalf together, that you take the clearing at \$100.00 an acre, isn't that so?

A. No he didn't.

Q. Well how was it proposed?

A. He asked me what I would do the clearing for.

(Testimony of Ernest Maehl.)

Q. Well was Metcalf right there?

A. Yes.

Q. And weren't you both together?

A. Yes sir.

Q. And didn't he make the proposal for you and Metcalf to do it?      A. No he asked me.

Q. Well I know he asked you but Mr. Metcalf was right there and you and Mr. Metcalf were together, weren't you?      A. Yes.

Q. And it was your intention and Mr. Metcalf's to do the work together, isn't that so? [173]

A. At that time yes.

Q. And all the conversation was about you and Mr. Metcalf doing the job together?

A. Yes at that time.

Q. And even though Mr. Barnard turned to you and said "Maehl what will you do this clearing for," Mr. Metcalf was there, and you knew that he referred to you and Metcalf?

A. Well he didn't say it in them words.

Q. But you knew that was it didn't you?

A. We figured on going together if we got that contract.

Q. And the conversation in 1935, that conversation was all with respect to you and Metcalf getting together and taking the clearing together?

A. At that time yes.

Q. Then in 1936 Metcalf wasn't with you at all was he?      A. No.

(Testimony of Ernest Maehl.)

Q. And you say Mr. Barnard came out on the West Fork job—that was a road job—and said “Maehl will you stand by the agreement you made last year?” I believe that’s what you said?

A. Yes sir.

Q. And you said “Yes?” A. Yes.

Q. And that was all that was said?

A. That’s all.

Q. Sir? A. That was all.

Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?

A. No. [174]

Q. You and Metcalf never went together to do the clearing, did you? A. No we didn’t.

Q. You knew in 1936 that Mr. Barnard had a contract for the construction of the Flint Creek dam with the Montana Water Conservation Board, did you not, or was going to bid on one?

A. Was going to bid on one.

Q. And you knew that, when you talked with him, it was dependent on whether or not he got the job, as to whether you would do any of the clearing? A. Yes sir.

Q. And you knew that if he did get the job and you were to do any of the clearing that it would be necessary to conform to the requirements of the Water Board engineers? A. Yes sir.

Q. So that you intended and it was your understanding at that time that you, if you got the job,

(Testimony of Ernest Maehl.)

would do what the Water Board engineers would require in the matter of clearing and grubbing?

A. Not all the grubbing, only on the dam site.

Q. No I mean with respect to the manner and whether or not you would do it right or wrong?

A. Yes.

Q. Not as to amount, I understand that. Did you yourself ever measure any of the areas that were cleared?      A. Roughly I did.

Q. Well when you say roughly you mean by that you stood out there and judged of the acreage, I take it?

A. Well I figured the amount of the area that was included [175] in a certain distance.

Q. Well I mean how did you get at that, with a tape measure or transit or did you just compute it from what your judgment was?

A. I used a tape measure.

Q. And what did you do, run the boundaries of it?

A. I just measured a certain that we cleared.

Q. But when you say you measured them were those areas square or irregular in shape?

A. Some of them was irregular and some of them fairly square.

Q. What did you do, take a tape measure and run around the outside boundaries of them?

A. Measured the length and the width and averaged it up.

(Testimony of Ernest Maehl.)

Q. You measured across this way north and south, we will say, and east and west, at three or four places? A. Yes.

Q. And averaged it up? A. Yes.

Q. And that is how you got 118 acres?

A. Yes sir.

Q. At the time that you first talked in 1935 was any mention made as to the number of acres there would be? A. Yes sir.

Q. Did Mr. Barnard say 118 acres?

A. He said there was practically 150 acres.

Q. So that the conversation with you at which Mr. Metcalf was present, in 1935, was the conversation in which Mr. Barnard referred to 150 acres?

A. Well at that time there was more than that.

Q. More than that; how much more? [176]

A. I think there was 200 and some odd acres.

Q. So that now I understand you to mean that in the conversation in 1935 Mr. Barnard proposed to you that you clear more than 200 acres?

A. Yes.

Q. And that is what you intended to do, you understood it that way?

A. According to what the acreage would be when it got measured up.

Q. And do you know what the acreage actually was?

A. Not exactly on the whole area.

Q. But it was your understanding and your agreement with Mr. Barnard, at which Mr. Metcalf

(Testimony of Ernest Maehl.)

was present and you two were together, that you would clear all of the acreage that Barnard and Curtiss had on the Flint Creek project?

A. Yes sir.

Q. And you say now that that was over 200 acres?

A. Yes sir.

Q. And what you actually did clear was 118 acres, as you say?      A. Yes sir.

Q. And your figures where you averaged it then, could be somewhat in error, would you say ten percent, or something like that?

A. I don't understand.

Q. Well you heard Mr. Hensolt say he measured, I think it was, 107½ acres?      A. Yes sir.

Mr. Smith: We object to that; I don't think that——

Mr. Toole: ——That is just explanatory. [177]

The Court: Yes the objection is well taken; that is for the jury as to what he testified to.

Q. Well could it have been 107½ acres instead of 118 acres, do you think?

A. At that certain area that he measured.

Q. In other words what is the accurate way of measuring acreage clearing?

A. Why generally cross section it and make a map of it and find out how many acres there is in a certain plot, with a chain, sometimes use a chain and sometimes an instrument.

Q. Did you use a chain or an instrument?



(Testimony of Ernest Maehl.)

A. I used a tape.

Q. So that when you went across the area you wouldn't know whether you were deviating a little bit from a straight line?      A. Not exactly no.

Q. And if the point, you didn't go right straight across to get your base line or your computation, and you went sideways or around stumps or around a little hill or something, your line would be longer, wouldn't it, than straight across?

A. I suppose so.

Q. And if it was longer then you would have a larger acreage than you should have, isn't that so?      A. Yes sir.

Q. By that way, did you keep any time after you came back in December?      A. No I didn't.

Q. And as you said I think, yesterday, you kept the time until you left there on November 9th or thereabouts?

A. On the men that I had working at the camp but I didn't keep none on the clearing after the 7th of October. [178]

Q. Who kept the time after that?

A. Mr. Metcalf.

Q. Mr. Maehl there is a paper the clerk has marked as Defendant's Exhibit 10; it appears to bear your name, and the date of March 15; can you identify that as having been made in your handwriting?      A. Yes sir.

Q. And is that a bill that you submitted to Barnard and Curtiss on the 15th of March, 1938?

(Testimony of Ernest Maehl.)

A. Yes sir.

Q. On the 15th of March, 1938, was the dam job all finished? A. Yes sir.

Q. Clearing had all been done and everybody had moved out by that time? A. Yes sir.

Mr. Toole: I offer that in evidence, your Honor.

Mr. Smith: We have no objection.

The Court: Very well, it will be admitted.

Thereupon was received in evidence without objection, and read to the jury, the document referred to, identified as and marked Defendant's Exhibit 10, and being as follows:

### DEFENDANT'S EXHIBIT 10 [179]

Philipsburg, Montana, 3/15 1938

Barnard & Curitis

In Account With

E. MAEHL

Contractor

Date	Charges	Credits	Balance
On West Fork Job			
(By 1320 Mile .....	8 Pr		105.60)
(			)
(By 10-2x12x16 .....	320.30		9.60)
(			)
(By 60 ft Decking Line.....			12.00)
Tools Furnished on Dam.....			69.80
Milige 800 mi.....	8		64.00
Short Pay on Camp			
423 Hours .....	35.00		148.25
			409.25

(Testimony of Ernest Maehl.)

Q. So that you submitted that bill to Barnard-Curtiss on the 15th of March, 1938?

A. I submitted it to Bob Barnard.

Q. Yes you gave it to Bob Barnard; and that was some time after all of this work had been done that you are talking about now, the clearing?

A. Yes.

Mr. Toole: Yesterday, your Honor, this time book was put in evidence, or a part of it, but I didn't offer the pages which would be defendant's exhibits 5 to 9 inclusive; may I offer those pages now?

The Court: Any objection?

Mr. Toole: Four to Nine inclusive.

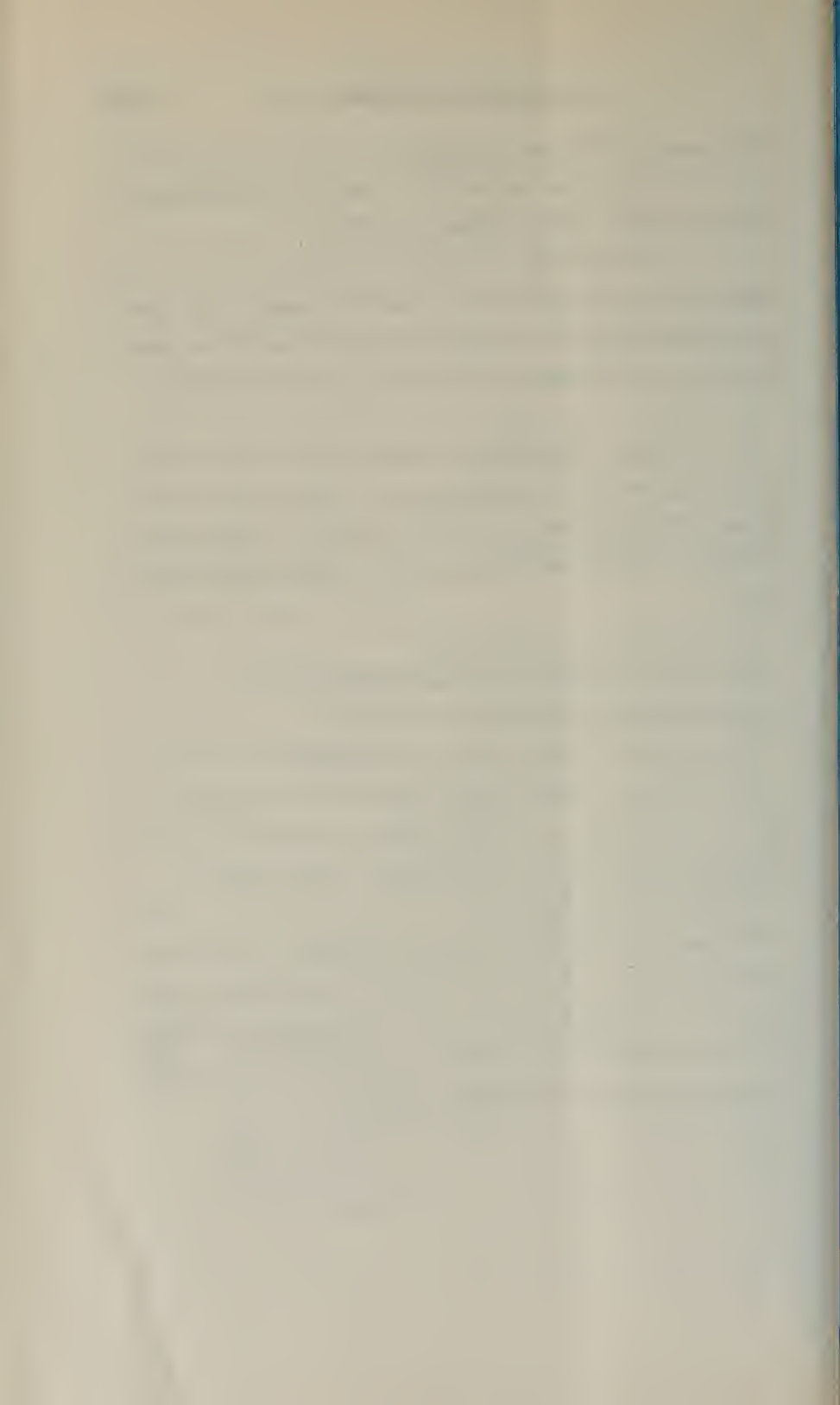
Mr. Smith: We have no objection.

The Court: They will be admitted.

Mr. Toole: May I have the Court's consent to put a red check on each corner so that it can be identified from the other pages in the book?

The Court: I think so.

Thereupon was received in evidence without objection and presented to the jury the document referred to, which includes the Defendant's Exhibits 4 to 9 inclusive, and which exhibits are severally and respectively as follows to wit:



DEFENDANT'S EXHIBIT 4 [181]

Clifton Applegate Co.

TIME BOOK FOR THE MONTH AUG 1936

5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Hours
																					4	8	8	8				
																					4	8	8	8			8	
																							8	8			8	
																							8	8			8	
																							8	8	8		8	
8			8	8	8	8	8																					
8			8	8	8	8	8		8	8	8	8	8		8	8	8	8	8					8	8	8		
8			8	8		8	8		8	8	8	8	8		8	6	8	8	8			8	8	8	8			
8			8	8		8	8		8	8	8	8	8		8	8	8	8	8			8		8	8	4		
8			8	8		8	8		8	8	8	8	8		8	8	8	8	8			8		8	8	4		
8			8	8		8	8		8	8	8	8	8		8	8	8	8	8					8	8	8		
8	8		8	8	8	8	8		8	8	8	8	8		8	8	8	8	8					8	8	8		
8	8	8	8	8	8	8	8		8	8	8	8	8		8	8	8	8	8					8	8	8		
8	8	8	8	8	8	8	8		8	8	8	8	8	8	8	8	8	8	8		8	8		8	8	8		
8	8	8	8	8	8	8	8		8	8	8	8	8	8	8	8	8	8	8					8	8	8		
8	8	8	8	8	8	8	8		8	8	8	8	8	8	8	8	8	8	8					8	8	8		
8	8	8	8	8	8	8	8		8	8	8	8	8	8	8	8	8	8	8					8	8	8		



DEFENDANT'S EXHIBIT 4 [181]

Clifton Applegate Co.

TIME BOOK FOR THE MONTH AUG 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount \$ Cts
Edward Nev.....																									4	8	8	8	8				21.00	
James Huddleston.....																									4	8	8	8	8	8			26.40	
Peery Berthoud.....																											8	8			8		14.40	
Elix Berthoud.....																											8	8			8		14.40	
E Harington.....																											8	8			8		14.40	
Wale Hale.....																											8	8	8		8		19.28	
Sept. 1, 1936.....																																	100.40	
Edward New.....	8	8	8	8	8			8	8	8	8	8																					48.00	
James Hudelson.....	8	8	8	8				8	8	8	8	8	8	8	8	8	8	8		8	8	8	8	8				8	8	8			105.60	
Peery Berthoud.....	8		8	8				8	8				8	8	8	8	8	8			6	8	8	8		8	8	8	8				94.80	
Elix Berthoud.....	8		8	8				8	8		8	8	8	8	8	8	8	8			8	8	8	8		8		8	8	4			93.60	
E Harington.....	8		8	8				8	8		8	8	8	8	8	8	8	8			8	8	8	8		8		8	8	4			98.40	
Wale Hale.....	8	8																															9.60	
Leo Munis.....	8	8	8	8	8			8	8	8	8	8	8	8	8	8	8	8			8	8	8	8			8	8	8				110.40	
Wale Munis.....	8	8	8	8	8			8	8	8	8	8	8	8	8	8	8	8			8	8	8	8			8	8	8				110.40	
Art Schliebatis.....	8	8	8	8	8	8		8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8	8			168.00	
New Hemert.....		7	8	8				8	8	8	8	8	8	8	8	8	8	8			8	8	8	8		8	8	8	8				100.20	
Wale Guiaini.....		7																															4.20	
Page.....		7	8	8	8			8	8	8	8		8																				42.60	
Wale Oliver.....		7	8	8	8			8	8	8	8	8	8	8	8	8	8	8			8	8	8	8		8	8	8	8				109.80	
Frank Kunze.....			8	8	8			8	8	8	8	8	8	8	8	8	8	8			8	8	8	8			8	8	8				100.80	





DEFENDANT'S EXHIBIT 5

Clifton Aplegate

TIME BOOK FOR THE MONTH SEP 190

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount \$ Cts
Reagn.....										6	8	8		8	8	8	8	8			8	8	8	8	8			8	8	8	26		57.60	
Lash.....										6	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8			57.60	
McLaughin.....										6	8	8		8	8	8	8	8		8	8	8	8	8				8	8	8			57.60	
Maughn.....										6	8	8		8	8	8	8	8					8	8	8	8			8	8	8			52.80
Edwards.....											8	8		8	8		8		8	8	8	8	8	8									52.80	
Lean.....											8	8		8																			7.20	
Lambert.....																	8	8	8	8	8	8	8	8			8	8	8	8			52.80	
Bradshaw.....																	8	8	8	8													19.20	
Eckhart.....																	8	8	4		8	8	8	8	8			8	8	8			50.40	
McClain.....																								8	8								9.60	
Fountain.....																								8	8								9.60	
Winghoff.....																								8	8								9.60	
Minnis.....																								8	8	8		8	8	8			28.80	
Rowerie.....																								8	8	8		8	8	8			28.80	
McCole.....																								8	8	8		8	8	8			28.80	



DEFENDANT'S EXHIBIT 6

Barnard Comp

TIME BOOK FOR THE MONTH SEP 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount \$ Cts	
H Cunningham.....											4	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		15½			
James Maehl.....											4	8	8	8	8	8	8			8	8	8	4				8	8	8	8		14			
Glen Bailey.....											4	8	8	8	8	8				8	8	8						8	8	8		11½			
Mons Sheaden.....											4	8	8	8	8	8	8			8	8	8	8	8			8	8	8	8		15½			
Ray Piper.....											4	8	8	8	8	8	8				8	8						8	8	8		11½			
Frank Williams.....											4	8		8	8	8	8	8		8	8				8	8	8					14½			
H Garup.....																		8	8	8	8	8	8	8				8	8	8		10			
B Hattin.....																		8	8	8	8	8	8	8				8	8	8	8		11		
H Redman.....																		4														½			
Dixon.....																			8	8	8	8	8	8			8	8	8	8		10			
B Maehl.....											4	8	8	8	8	4	4	8	8	8	8	8	8	8	8	8	4	8	8	8	8		18		
T Hubacka.....																														8		1			



DEFENDANT'S EXHIBIT 7

Barnard Comp

TIME BOOK FOR THE MONTH OCT 16 1936

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount \$ Cts		
Cunningham.....	8				8	8																														
Maehl.....	8				8	8	8	8	8			8	8	8	8	8			8	8	4															
oni Sharder.....	8				8	8	8																													
len Bailey.....	8	8			8	8	8	8	8			8	8	8	8	8			8	8	8	8	8			8		8	8	8	8					
Maehl.....	8	8	8		8	8	8	8	8	8		8	8	8	8	8	8		8	8	8	8	8	8		8	8			8	8	8	25			
ay Piper.....	8	8			8	8	8	8	8																											
rank Williams.....	8	8			8	2																														
avre Gerrey.....	8	8			8	8																														
enry Hattis.....	8				8	8																														
Dixon.....	8				8	8																														
Hubacka.....	8	8	8		8	8																														
Beckman.....					8	8	8	8	8																											
an McKinney.....						8	8	8	8																											
aray Munter.....						8	8	8	8																											
anzel Hanifan.....						8	8	8																												
Twing.....						8	8	8				8	2																							
Walters.....																8	8		8	8	8	8	8			8	8	8	8	8						
Metcalf.....																																				



DEFENDANT'S EXHIBIT 8

Clearing

TIME BOOK FOR THE MONTH OCT 190

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount \$ Cts	
Harvey Gerrey.....							8	8	8			8		8	8	8																			
Tim Hubaca.....							8	8	8			8	8	8	8	8																			
B Hattis.....																																			
John Roch.....							8	8	8	8		8	8	8	8	8																			
H. Cunningham.....							8	8	8			8	8	8	8	8																			
E Dixon.....							8	8	8			8	8	8	8	7																			
Fred Game.....								8	8	8			8	8	8	8																			
Tim Hanifan.....								8	8	8																									
Howard King.....								8	8	8		8	8	8	8																				
Mat Karnula.....									8	8		8	8	8	8	8																			
Charley Spink.....									8	8						1/2																			
H Beatman.....												1/2	8	8	8	8																			
G Aset.....							2	5	6	xx			8	8	8	8																			
D Twing.....												6	8	8	8	8																			
Mat Sanders.....													8	8	8																				
Lawes.....																8																			
H Munter.....																8																			
Dan McKiney.....																8																			
																466 1/2																			
																Hours																			

Haws  
2. 05 21 1/2





DEFENDANT'S EXHIBIT 9

Barnard Curtis

TIME BOOK FOR THE MONTH NOV 190

Names	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	Total Time	Rate Pday	Amount \$ Cts
Z Maehl.....		8		4	8	8	8		8													S												
B Walters.....		8		8	8	8	8																									8992		
Glen Bailey.....						4	8		8																									
John Muner.....									2																									
Mc Muner.....									2																									
Geo Muner.....									2																									

Bay Hose 83½ 6.68  
 Gray 20 1.60

[187]



(Testimony of Ernest Maehl.)

A Juror: May I ask a question in connection with this bill?

The Court: What is that? May you ask a question?

The Juror: Yes.

The Court: Sure, any juror has a right to ask any question within the issues.

The Juror: This last item here—"Short Pay On Camp, 423 hours at 35 cents; that 35 cents represents the difference between 85 cents and \$1.20, is that correct?

The Witness: Yes.

The Court: Any further redirect?

Mr. Smith: Yes—we have no objection. [188]

#### Redirect Examination

By Mr. Smith:

Q. At the time you went to the East Fork job in 1935 with Mr. Barnard—with the two Mr. Barnards and Mr. Metcalf—had the general Water Conservation Board surveyed that acreage, do you know?

A. They had made a kind of a preliminary survey of it.

Q. Was there anything definite in the amount that had to be cleared and grubbed, so far as you were aware at that time?      A. No.

Q. Was the whole matter of clearing and grubbing to be determined later by the plans and specifications of the Water Board?

(Testimony of Ernest Maehl.)

Mr. Toole: Objected to as immaterial. A further objection is now made that when this case opened they asked this witness what his conversation with Mr. Barnard was, and stated that in 1935, stated that the conversation was that he had agreed with Mr. Barnard on certain things; now it develops on his cross examination the agreement was that he and Metcalf made the agreement and not this witness; the subsequent conversation of 1936 wherein it was said that he had said that he would stand by his agreement of 1935, that becomes immaterial because the agreement of 1935, by his own statement now, was made with him and Metcalf and not with him, and any conversation now becomes immaterial because the plaintiff has failed to prove his contract.

The Court: The testimony as I recall it is this: that in 1935 it was expected that the defendant here would get his contract; at that time talk was had between Jim Barnard, Maehl and Metcalf, and consideration of doing certain [189] work which was then to be done by witness and Metcalf; the witness said that was the intention in 1935, and it appears from the contract that was not done and it was not expected he would be a party to it; as I view the matter that is one for the jury to determine whether to the extent of the acreage and amount to be paid for doing the work that was done as agreed upon him in 1935, was intended to be incorporated in

(Testimony of Ernest Maehl.)

the contract of 1936, if there was such a contract; that's your position, isn't it?

Mr. Smith: That is my position.

The Court: Overruled.

Mr. Toole: Note an exception.

The Court: It will be noted.

Mr. Toole: Read the question.

Q. (read by reporter) Was the whole matter of clearing and grubbing to be determined later by the plans and specifications of the Water Board?

Mr. Toole: Now that is objected to as calling for the conclusion of the witness and not within the issues of this case and upon the further ground that the only way that plaintiff could make a contract is by stating what was said and not by stating what was to be determined.

The Court: Well you set it up in each of your counter claims that such is the fact, and I don't think it is necessary to prove it; however you opened it up in your examination, so the objection is overruled.

Mr. Toole: I would like to have it clear that plaintiff has said that, that all the agreements, the plaintiff has answered, are included in one.

The Court: Are included in the 118 acres, as I took [190] it.

Mr. Smith: Well there is another 150 acres involved in this law suit that will come in, that is not included in the 118, which has not yet been mentioned; Mr. Toole will probably introduce evidence about that.           A. (No answer)

(Testimony of Ernest Maehl.)

Whereupon, with the usual admonition by the court to the jury, recess was had at 10:55 o'clock a. m. until 11:10 o'clock a. m., when the trial was resumed.

The Court: Proceed.

Q. Mr. Maehl I show you the paper marked Defendant's Exhibit 10, which is a bill presented by you to Barnard-Curtiss; will you explain to the court and jury the circumstances under which that was given, please?

A. Bob Barnard happened to come to Philipsburg to move some machinery and I asked him for a statement . . .

Mr. Toole: Now wait a minute; if it please the court we object to a statement with respect to the exhibit because the exhibit speaks for itself and is in writing.

The Court: The objection is overruled; the circumstances as to its making are clearly competent. Proceed.

Q. Will you go ahead now?

A. He said "We ain't got no final settlement yet on the clearing;" and I says "What is the matter with paying me for my tools and the other bills that you owe?" "Well," he says, "make out a separate statement of them and give it to me and I will see what can be done about it and we will pay it."

Q. Was any payment ever made?

A. No. [191]

(Testimony of Ernest Maehl.)

Q. During the course of that conversation was anything said about clearing?

A. He said at that time that he didn't have the total estimate yet, which he should have had by that time, and I guess he didn't have it, but he said he didn't have it yet.

Q. Well what do you mean by the total estimate?

A. On the clearing, what clearing we done.

Q. Well who made that estimate if you know?

A. The engineer.

Q. What engineer?

A. Water Board engineer.

Witness Excused.

---

Mr. Smith: The plaintiff rests, your Honor.

The Court: Open for the defendant.

Whereupon Mr. Toole made an opening statement to the jury on behalf of the defendant.

And thereupon the following evidence was introduced by defendant upon its case in chief:

J. A. BARNARD

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

By Mr. Toole:

Q. What is your name please?

(Testimony of J. A. Barnard.)

A. J. A. Barnard. [192]

Q. You were on the stand yesterday and testified that you are secretary-treasurer of Barnard-Curtiss Company?      A. That's right.

Q. Who is the actual managing officer of that company—that is, do you run the company, Mr. Barnard?

A. Well I handle most of the jobs, yes sir.

Q. And the jobs of that company, the Flint Creek job in particular, was under your control and management?      A. This job was yes sir.

Q. Were you there on that job all of the time?

A. No sir.

Q. What would you say as to how much of the time you spent up there, just—

A. —Oh I would be gone at a week or two weeks intervals and back again; I kept in close touch with it.

Q. And do you recall a conversation with Mr. Maehl in 1935 with respect to the Flint Creek project?      A. I do.

Q. At what time was that, about?

A. It was in the fall of 1935.

Q. And under what circumstances was that conversation had?

A. The Flint Creek project was advertised by the Montana State Water Board, bids to be taken, and we had performed some work in that vicinity, in fact we were working there on another project at the time and was on the job.



(Testimony of J. A. Barnard.)

Q. Was that other project you refer to the road job?

A. The highway job some 10 or 12 miles away.

Q. Go ahead?

A. Both Mr. Metcalf and Mr. Maehl had worked for us before in similar work, that is, clearing work, grubbing. [193]

Q. In what capacity had they worked theretofore?

A. As foremen, and they had completed—one of them had a subcontract from us one time before that.

Q. Which one of them was that?

A. Mr. Maehl.

Q. Was that contract in writing?

A. I think it was.

Q. You haven't that with you I suppose?

A. I don't have it with me, no.

Q. Proceed?

A. We therefore thought about these gentlemen with reference to doing this clearing job, and contacted them at Philipsburg and made arrangements, and I did go up to see them about the work with the view of their giving us a price on the job to do the entire clearing job and the grubbing job.

Q. Did you then go out to the job?

A. Oh yes we went all over it.

Q. Now when did you go out there, as near as you can remember?

(Testimony of J. A. Barnard.)

A. The month or day?

Q. Well just as closely as you can? Was it in the fall of 1935?

A. My recollection is that it was in the fall of 1935 and that is about as close as I can give it to you.

Q. And who went out from Philipsburg to the site of the dam?

A. Mr. Maehl and Mr. Metcalf and Robert, my brother, and myself.

Q. How did you go out? [194]

A. In Mr. Maehl's pickup car.

Q. How did you happen to pick up these two men in Philipsburg, both of them, do you know?

A. Well we contacted them, made arrangements with them, to go with us—I may not understand your question.

Q. Well did you see them yourself or did you have some one do it?

A. I don't recall, I think possibly I did.

Q. At any rate you got in Mr. Maehl's car did you?

A. Yes sir.

Q. Drove out to the site of the dam?

A. Yes sir.

Q. And what did you do out there?

A. Walked over the project.

Q. Were all four of you together as you walked over the project?

A. As I remember we stayed together all the

(Testimony of J. A. Barnard.)

time; we ate dinne rout there at this ranch house together.

Q. How long a time did you spend out there?

A. Pretty much of the day.

Q. Now state what was said by you either to Mr.—well, to Mr. Maehl, with respect to the clearing and grubbing on the project?

A. As near as I can recall I merely asked them the question, after we had been over the work and they had viewed it, what their estimate of the value of the job would be or what they would do it for per acre.

Q. Now you say “they”; which one do you mean—whom do you mean?

A. My understanding was that they were going to be toge- [195] ther.

Mr. Smith: We object to what his understanding was.

Mr. Toole: That may be stricken.

The Court: It will be stricken and the jury will pay no attention to it.

Q. At the time that the conversation took place would you remember whether it was in the presence of both Mr. Maehl and Mr. Metcalf?

A. I think we were together all of the time.

Q. And to whom were your remarks directed?

A. I think Mr. Maehl.

Q. And was Mr. Metcalf there?

A. Yes.

(Testimony of J. A. Barnard.)

Q. Do you remember whether he participated in the conversation or not?

A. I couldn't say.

Q. At any rate how were Maehl and Metcalf standing, so far as you can remember, close together, or would they have been separated on the job?

A. Oh we became separated once or twice but we were together most of the time.

Q. And when the conversation took place were you together or separated?

A. We were together.

Q. And then what did Mr. Maehl say?

A. He gave me the price of \$100.00 per acre.

Q. Well could you say now what were his exact words?

A. I couldn't recall the exact words.

Q. Did he say that they—or we, will do it, or words to that effect? [196]

Mr. Smith: Objected to as leading.

The Court: It is leading but the damage is done. The question is what did he say.

The Witness: What did Maehl say?

Mr. Toole: Yes.

A. My recollection is that he said we would do the clearing for \$100.00 per acre.

Q. And did Mr. Metcalf as you recall say anything at that time?

A. No I don't know as he did.

(Testimony of J. A. Barnard.)

Q. Then what else if anything was said there with respect to this?

A. I don't recall anything else being said about it.

Q. Then after that what did you do?

A. Did I do?

Q. Yes what did you all four do?

A. Well we left the project and went back to Philipsburg.

Q. Drove back in Mr. Maehl's car?

A. Yes.

Q. Did you then separate from Mr. Maehl and Mr. Metcalf?           A. Yes sir.

Q. And then what happened with respect to the project?

A. We placed a bid on the project and when the bids were opened at Helena the project was not awarded to anyone; it was readvertised at a little later date.

Q. Are you able to say how much clearing there was in the project as advertised at that time, the total clearing?

A. What the figure was, set up figure at that time?

Q. Yes.

A. In here I think 150 acres. [197]

Q. That was at the first time?           A. Yes sir.

Q. And was any reference made to the amount of the acreage at the time you talked with Mr. Metcalf and Mr. Maehl out on the job?

(Testimony of J. A. Barnard.)

A. We understood that the——

Q. ——Don't say what you understood—if anything was said?

A. I do recall that there was some conversation about whether or not the Water Board estimate was correct or not or whether it would vary, as it often does.

Q. Did you have any record or did Maehl or Metcalf have any record present to indicate the amount of the clearing set-up at that time?

A. Do we have a record?

Q. Did you at that time, with you?

A. I think we had the notice of the hearing from the state.

Q. Do you remember either showing that to Mr. Maehl or consulting him about it?

A. No I don't know as we did, we talked about it I know, but I don't know as I showed him the notice.

Q. Well now state as nearly as you can—you don't have to give the exact conversation but as near as you can—as to what was said between you and Maehl and Metcalf, or you and Maehl, about the amount of the acreage up there at that time.

Mr. Smith: Object to this on the ground that it is repetition.

The Court: Overruled.

A. Well we assumed that the—or knew that the acreage [198] as set up, would have to be figured

(Testimony of J. A. Barnard.)

unless changed by the engineers by actual measurement.

Q. And how much was the figure as set up?

A. 150 acres, is my recollection.

Q. Well then you have already said that you all came back to Philipsburg, and you bid on the job?

A. Yes sir.

Q. And did you get the job at that time?

A. We did not.

Q. And some other contractor bid lower than you?

A. There was a lower bid than ours.

Q. And then what happened to the project?

A. I think it laid dormant for about eight months.

Q. Did the Water Conservation Board award the contract covering the project to the low bidder at that time?

A. I think they awarded it to them but that they refused to proceed.

Q. At any rate was ever any work done up there by any other contractor on a contract with the Water Board?

A. No there never was any work done.

Q. And then what happened?

A. It was readvertised.

Q. Did you bid on it a second time?

A. We did.

Q. What was the result of that?

(Testimony of J. A. Barnard.)

A. We were low bidders that second letting.

Q. Did you then or at some time about that time have a conversation with Mr. Maehl?

A. I did.

Q. Where was it? [199]

A. On the Rock Creek road job.

Q. Where was he working, if you know, at that time?

A. I couldn't state the exact position on the project but he was out there on some culvert work.

Q. And who was he working for?

A. He was working for Barnard-Curtiss Company?

Q. In what capacity? A. As a foreman.

Q. And that was on the road job over on the West Fork of Rock Creek? A. Yes.

Q. You were constructing that for the Highway Commission were you? A. Yes.

Q. What was the conversation you and Mr. Maehl had at that time, as near as you can remember?

A. I stated that the job was coming up again and wanted to know if, in case we got it, that he would be interested in some clearing work up on the project again.

Q. What did he say?

A. He said he would.

Q. What else? A. That's about all.

Q. Who else was present at that time, anyone, that you know?



(Testimony of J. A. Barnard.)

A. I don't remember that there was anyone present.

Q. Just you and Maehl?

A. There may have been but I don't recall it if there was.

Q. Did you at that time say to Mr. Maehl, did you ask him if he would stand by his contract of the previous year, or [200] words to that effect?

A. No I did not.

Q. Was anything said with respect to the contract for the previous year?

A. I don't think so.

Q. After he said that he would be interested in some clearing was anything said that you recall?

A. Not that I recall.

Q. And then what did you do?

A. Well I don't know whether I left the job that day or not, I did either within a day or two.

Q. That is did you go back to Helena in the course of the next day or so?

A. I think I did.

Q. And did you bid at the second letting?

A. Yes sir.

Q. Do you know whether that bid that you made was before or after the conversation with Mr. Maehl on the West Fork of Rock Creek?

A. My best recollection is it was before.

Mr. Smith: What was that question, the bid was made before?

(Testimony of J. A. Barnard.)

Mr. Toole: He said his recollection was the conversation was before.

The Witness: Yes.

Q. The conversation was before the bid. Then after the bid were you awarded the contract—was Barnard-Curtiss Company awarded the general contract for the construction of the dam project?

A. Yes sir. [201]

Q. And after you were awarded the contract what if anything was done with respect to Mr. Maehl?

A. Well I contacted my brother who was superintendent on the job, by either wire or mail, I forget which, and directed him to get the dam site clearing started at once, to contact Mr. Maehl and to start the job.

Q. Instructed your brother to get Mr. Maehl?

A. Yes sir.

Q. To start the job of clearing. Do you know then when you next went back to Philipsburg yourself?

A. I couldn't recall now—you mean the job, not to Philipsburg, which was out quite a ways?

Q. Yes I mean the job when I say Philipsburg? What is the next recollection you have with respect to seeing Mr. Maehl?

A. Out at the camp.

Q. And when would you say that was?

A. Oh probably two weeks after the work was started, not later than that.

(Testimony of J. A. Barnard.)

Q. Do you know what he was doing at that time?

A. I can't say, the day I came there, whether he was on the dam site or whether he was down working on the camp; my recollection is that he was working at the camp.

Q. Well with respect to the dam site clearing and grubbing on the dam site, what was the practice of the Water Board with respect to payment for the work done and time of payment and the method of determining the amount done so that payments could be made?

A. Measurements were taken once a month and an estimate prepared and we were paid I think 90 percent of it. [202]

Q. Now to refresh your recollection, Mr. Barnard, I am handing you a document marked Defendant's Exhibit 11, and I wish you would state to us whether or not that is a periodic estimate given you by the Water Board—given Barnard-Curtiss Company—

A. —It is Estimate number 1.

Q. And when you say Estimate Number 1 is that the first estimate made?      A. Yes sir.

Q. Issued by the Water Board?

A. It is.

Q. Does it have any reference to clearing?

A. None whatever—well, just a minute.

Mr. Smith: At this time we object to questioning from this memorandum on the ground that it is not

(Testimony of J. A. Barnard.)

properly qualified as a memorandum of which the witness has any knowledge.

Mr. Toole: I am about to offer it in evidence.

The Court: Overruled.

Q. Does it have any reference to clearing?

A. No.

Q. And at the time that that estimate was received had any substantial amount of work been accomplished by Barnard and Curtiss Company in the clearing?           A. No sir.

Q. Or any other work—on the job?

A. No sir.

Mr. Toole: I will state to the court that I am offering it simply in this order because Estimates 1, 2, 3 and 4 will come along in their order; and I am offering [203] Exhibit 11.

Mr. Smith: I don't quite understand just what this is; may I examine the witness a minute?

Mr. Toole: Yes.

Q. (Mr. Smith) Who prepared these periodic estimates?           A. We prepared them.

Q. (Mr. Smith) This estimate, Exhibit 11, is an estimate prepared by your company?

A. Yes sir.

Mr. Smith: We object, your Honor, to the Defendant's Exhibit 11, on the ground that it has not been qualified as an account book; that it is shown to be a public document, and it isn't shown to be a memorandum at all used to refresh the witness' recollection; on the ground that it is simply a self serving declaration, and not yet qualified.

(Testimony of J. A. Barnard.)

Mr. Toole: It is immaterial except that it is a part of the other estimates that will come along and will be properly qualified, and I will offer it later.

The Court: Very well.

Mr. Toole: I will offer it later.

The Court: Very well.

Mr. Smith: What is the status then, offered and withdrawn?

The Court: He has withdrawn the offer.

Mr. Toole: Yes I withdraw the offer.

Q. Now you have stated that you were the manager or the person who was in charge of this company's work; were you or are you familiar with the manner of computing the amount, of the Water Board—the manner or method used by the Water Board in computing the amount accomplished—the work [204] accomplished, on one of these contracts, and in making the payment to the contractor for such work?      A. I am.

Q. And tell us how that is done? What is the document, what paper, what is the document called upon which that computation is made and the payment for the work accomplished finally made?

A. On an estimate of that nature.

Q. Is it made upon a document called a Periodical Estimate for Partial Payment?

A. That's right.

Q, And did Barnard-Curtiss Company on the Rock Creek dam job receive payments from the

(Testimony of J. A. Barnard.)

Water Conservation Board on such Periodical Estimates?      A. We did.

Q. And do those estimates show, among other things, the amount of clearing and grubbing done?

A. They do.

Q. And were such estimates made and paid to you throughout the entire project?

A. They were.

Q. And who actually made the estimates?

A. The engineer on the project.

Q. And whose engineers were those?

A. The State Water Board.

Q. Did Barnard-Curtiss Company have any method of checking or watching the amount of such estimates?      A. Oh yes we checked them.

Q. Did you have an engineer?

A. I don't know as we did the time the first estimates [205] were prepared; we did eventually.

Q. And do you as manager of that company or general manager know whether or not the Periodical Progress Estimates made were correct?

A. I do.

Q. And were they correct throughout the job?

A. In every respect, do you mean?

Q. With respect to the clearing and grubbing items particularly?

A. We accepted them as being correct yes.

Q. And you were paid on the basis?

A. We were paid on that basis.

Q. By the Montana Water Conservation Board?

(Testimony of J. A. Barnard.)

A. Yes sir.

Q. Now then I will take Defendant's Exhibit 11 and I will ask you if that is the original or duplicate original of the estimate made to Barnard-Curtiss Company, and by Barnard-Curtiss Company accepted as a basis for payment for the amount of work done on the project?

A. It is an exact copy of Estimate number 1.

Q. Yes it is your own, your company's record, is it?

A. Yes.

Mr. Toole: I offer the exhibit.

Mr. Smith: We make the same objection, your Honor, that if this purports to be a private book of account or record of business, it has not been qualified within the rule allowing book entries to be admitted; no showing of the correctness of this document, how it was prepared, whether it is contemporaneous to the matter it purports to relate to; and if it is assumed to be a public record it [206] has not been shown to be such; it is clearly not a memorandum made by this witness, and the witness admits that he has accepted it but apparently has no knowledge of its accuracy, of his own knowledge.

Mr. Toole: Of course, your Honor, the original statement of the plaintiff was that he knew he had the work to do in conformity with the contract of the Water Board, and that he at one time discussed payments, they had not gotten their final estimates and they were delayed on that account; but I may

(Testimony of J. A. Barnard.)

state to the court that if necessary we can go into the books of account; that is the thing we sought to avoid.

The Court: Well I think counsel's objection really is based upon not laying the foundation; as I understand the rule, before a private record may be introduced in evidence it must be shown that it was kept in the ordinary course of business, that it was accurately kept, that the entries were made at or near the time of the transaction, and either by or under the supervision of the party who is testifying; is that your understanding?

Mr. Smith: That is my understanding.

Mr. Toole: May I ask the witness a few more questions?

The Court: Sure, proceed.

Q. Are these estimates, Periodical Progress Estimates—that is, how are they made up, are they made or checked in your company's offices?

A. The engineer on the project furnishes the figures but under the rules of the WPA—

Mr. Smith: Well we object to the witness testifying [207] to the rules.

Q. You are in direct supervision of the project?

A. Yes sir.

Q. And of all the persons employed?

A. Yes sir.

Q. And are you in direct supervision of the bookkeeper? A. Yes sir.

Q. Engineers who make these estimates up?

A. Yes sir.



(Testimony of J. A. Barnard.)

Q. Or who approve them for you?

A. Yes sir.

Q. And are they records which are kept in the ordinary course of business by your company?

A. Yes sir.

Q. On all of your projects?           A. Yes sir.

Q. Were these particular documents so kept by you at the time of the Philipsburg or West Fork dam job?           A. Yes sir.

Q. And are they documents that are made up contemporaneously with or at the time of—when the work was done? Or immediately afterwards?

A. Yes sir.

Q. Then with respect to this Exhibit 11 was this document a document which was made in the offices of Barnard-Curtiss Company under the supervision of your employees?

A. I made it myself.

Q. It is in your handwriting is it?

A. Yes sir.

Q. Well was it made at the time along about August 31st [208] or shortly thereafter?

A. Yes sir.

Q. And is it the kind of a document that is ordinarily kept in the records of Barnard-Curtiss Company?           A. Yes sir.

Q. Is it the kind of a document which all contractors are required to furnish or to submit to the Water Board for payment of the quantities that are in it?           A. Yes sir.

(Testimony of J. A. Barnard.)

Q. It is in regular form, is it, of that kind?

A. Yes sir.

Q. And are the entries in the document correct?

A. They are correct.

Mr. Toole: Well now I offer it.

Mr. Smith: May we examine him.

Q. (Mr. Smith) Mr. Barnard so far as your statement that the entries are correct you have no personal knowledge of that?

A. Yes I have.

Q. (Mr. Smith) Did you check the work in the field? A. I kept close watch of it.

Q. (Mr. Smith) Did you take a transit and measure it? A. No.

Q. (Mr. Smith) The figures that were placed on your books were not figures made out by your own employees were they?

A. No sir they were made by the engineers.

Q. (Mr. Smith) And the engineers were employed by the State Water Board?

A. By the State Water Board. [209]

Q. (Mr. Smith) Do you have in your bookkeeping system any other documents or records showing these figures?

A. Not that I know of.

Q. (Mr. Smith) What do you do with the figures turned over by the engineers of the state, what do you do with them?

A. These are the figures we receive for the estimate payments, right on the estimate.

(Testimony of J. A. Barnard.)

Q. (Mr. Smith) Do the engineers put the figures on the estimates?

A. They require them on this particular estimate.

Q. (Mr. Smith) Yes but I mean do they actually put the figures on the sheets?

A. No I put them on myself, they furnish us with a statement and we prepare it from their figures.

Q. (Mr. Smith) Well did you keep any of those statements? A. I don't believe we did.

Q. (Mr. Smith) The first original record that you had that ever came into your hands would be the statement? A. Yes sir.

Q. (Mr. Smith) Prepared by the engineer?

A. Yes sir they brought it out to us and we prepared this from it.

Mr. Smith: We have no objection.

The Court: It will be admitted without objection.

Mr. Toole: I think this could be submitted to the jury.

The Court: Well it can be submitted and you may refer to any part of it you think should be material now or later. [210]

Mr. Toole: I think with the court's consent I will read the part that has to do with——

The Court: The part you deem material.

Mr. Toole: Yes.

And thereupon was received in evidence without objection, and presented to the jury, the document

(Testimony of J. A. Barnard.)  
referred to, the same being identified as and marked  
Defendant's Exhibit 11, and being as follows:

DEFENDANT'S EXHIBIT 11

P. W. Form I-23

Sheet 1 of 1 sheets.

(Revised 8-6-35)

Federal Emergency Administration of Public  
Works

PERIODICAL ESTIMATE FOR PARTIAL  
PAYMENT No. 1, DOCKET No. Mont.-100  
9 R u-3

For the period Aug-1-to Aug 21, inclusive.

Type of project—irrigation.

Location Flint Creek Valley State Montana.

Borrower's name and address Montana Water  
Conservation Board.

Symbol No.....

Contract No. 3

Estimated cost, \$264,227.75.

Contract price, \$.....

Contractor's name and address:

Barnard-Curtiss Co.

Philipsburg Montana

Item No.

Units or lump sum.

Estimated Number of Units (Quantity)

Detailed estimate.

This estimate.

To date.

(Testimony of J. A. Barnard.)

Uncompleted.

Estimated physical percent completed.

Period Percent.

To date Percent.

On account of so Little work being done during this period no Request for payment is being made

Total physical percent complete. [211]

Amount

Item No.

Unit Price—\$

Detailed estimate—\$

This estimate—\$

To date—\$

Unused balance—\$

Estimated monetary percent completed.

Period Percent.

To date Percent.

Totals

Total—Change orders,

Materials stored, if allowed,

Grand total,

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

“Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the

(Testimony of J. A. Barnard.)

benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than \$2,000 or imprisoned not more than 1 year, or both."

Section 35 of the Criminal Code, as amended, provides a penalty of not more than \$10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements . . . or use or cause to be made or used any false . . . [212] account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement . . . relating to any matter within the jurisdiction of any governmental department or agency.

#### CERTIFICATION OF THE CONTRACTOR OR HIS DULY AUTHORIZED REPRESENTATIVE.

To the best of my knowledge and belief, I certify that all items, units, quantities, and prices of work and material shown on the face of Sheets Nos. of this Periodical Estimate are correct; that all work has been performed and materials supplied

(Testimony of J. A. Barnard.)

in full accordance with the terms and conditions of the corresponding construction contract documents between Montana State Water Board and Barnard-Curtiss Co., dated Aug 10 1936, approved by the State Director, and all change orders approved by the State Director; that the following is a true and correct statement of the contract account up to and including the last day of the period covered by this estimate and that no part of the "total amount payable this estimate" has been received:

(unit price contract

(a) Total due based on the (lump sum contract	\$0
(b) Total additions beyond scope of contract	0
(c) Total earned, original contract and additions (sum of a and b).....	0
(d) Total percentage retained including this estimate .....	0
(e) Total due on account of original contract plus additions and minus retained percentage.....	0
(f) Total previously received (from last estimate) .....	0
—	
(g) Balance due this payment on contract and additions .....	\$0
(h) Advance on materials stored this period.....	0
—	
(i) Total amount payable this estimate.....	\$0

(Testimony of J. A. Barnard.)

I further certify that all just and lawful bills against Barnard-Curtiss Co for labor, material and expendable equipment [213] employed in the performance of said contract have been paid in full in accordance with Paragraph 11, 12, P. W. A. Construction Regulations.

Contractor Barnard Curtiss Co. Place Philipsburg Montana

By J A BARNARD

Title Secty-Treasurer

Date Sept 4 1946

**CERTIFICATE OF THE BORROWER'S SUPERVISING ENGINEER OR ARCHITECT IN CHARGE.**

I certify that I have verified this Periodical Estimate, and that to the best of my knowledge and belief it is a true and correct statement of work performed and material supplied by the contractor, and that the contractor's certified statement of his account and the amount due him is correct and just, and that all work and material included in this Periodical Estimate have been performed and supplied in full accordance with the terms and conditions of the corresponding construction contract documents and change orders approved by the State Director.

Name..... Place.....

Title..... Date.....



(Testimony of J. A. Barnard.)

CERTIFICATE OF THE PUBLIC WORKS ADMINISTRATION ENGINEER INSPECTOR IN CHARGE.

I certify that I have verified this Periodical Estimate, and that to the best of my knowledge and belief it is a true and correct statement of work performed and material supplied by the contractor, that I have in my possession satisfactory evidence of payment by the contractor of all just and lawful bills against him for labor, material, and expendable equipment [214] employed in the performance of his contract in full accordance with \*Paragraph 11, 12, P. W. A. Construction Regulations, that all work and material included in this Periodical Estimate have been inspected by me or my duly authorized assistants and have been found to comply with the terms and conditions of the construction contract documents and change orders approved by the State Director.

Name..... Place.....

Title..... Date.....

\*Strike out number not applicable.

## REMARKS—MATERIALS STORED

## Change Orders

No.  
 Additions—\$  
 Deductions—\$  
 This estimate—\$  
 To date—\$  
 Unused balance—\$  
 Estimated percent completed  
 Period  
 To date  
 Total,  
 Less deduction orders,  
 Total—Change orders, [215]

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Q. Now we have just admitted in evidence, Mr. Barnard, the progress estimate or the periodical estimate number 1, of August 31—what year?

A. 1936.

Whereupon at 12:00 o'clock noon, with the usual admonition to the jury, court was recessed until 2:00 o'clock p. m., at which time the trial was resumed.

The Court: Proceed.

Q. Mr. Barnard I will just hand you these documents, three of them all fastened together; will you state just in name what those documents are?

A. The first one is the periodical estimate from September 1 to September 30, or number 2.

(Testimony of J. A. Barnard.)

Q. What year? A. 1936.

Q. And what is the second one?

A. Number 10.

Q. Periodical estimate number 10?

A. From May 1 to 31.

Q. 1937? A. Yes.

Q. And what is the next one?

A. June 1 to 3, number 11.

Q. 1937? A. Yes.

Q. Now Mr. Barnard are one or more of those in your handwriting?

A. The first one is; number 2 is.

Q. And are the other two typewritten?

A. The other two are typewritten. [216]

Q. Were those documents prepared in your office or in the office of Barnard-Curtiss Company?

A. Yes.

Q. And were they prepared under your supervision? A. Yes.

Q. When would each document have been prepared, that is, take the first one, do you know——

A. ——After September 30, number 2 would have been.

Q. How soon after? A. A few days.

Q. Was each of them prepared within a few days after the period for which it covered?

A. It was.

Q. And was it prepared by persons under your supervision? A. Yes sir.

(Testimony of J. A. Barnard.)

Q. Do you give those estimates close supervision, the preparation of them? A. I do.

Q. And why do you do that?

A. To be sure we get paid, so as to get out money out of it, the correct amount.

Q. Then would you say the statements contained in those estimates are correct?

A. I would, substantially correct, yes.

Q. And now just refer to the first one, periodical estimate September 1 to 30, 1936; tell us how much of the clearing and grubbing had been done on the dam site at that time?

Mr. Smith: We object to each of these memorandums unless it is a memorandum to test the recollection of the [217] witness.

The Court: Yes, I think it must be shown that he refer to the memorandum to refresh his memory. is not able to testify from recollection and must

Mr. Toole: Well, I will ask that.

Q. Can you testify, Mr. Barnard, whether you refer to the memorandum or not, as to how much of the clearing was done as of the end of September 1936? Can you answer that question, can you testify, do you know, without referring to the memorandum? A. I do.

Q. Have you discovered that because you did refer to the memorandum or did you know without it?

A. No I think I had to refer to it before I knew it.

(Testimony of J. A. Barnard.)

Q. And now I will ask you, can you testify, or do you know, without referring, either now or at some previous time, to that memorandum or estimate—

A. —I believe I would remember it, yes.

Q. Well can you testify from your own memory without referring to any memoranda, as to the amount of clearing on the dam site, clearing and grubbing done, on those dates? That is, do you know that of your own independent knowledge or do you have to refer to such estimates?

A. I have to refer to the estimates.

Q. Well then I now ask you what was the amount of clearing and grubbing done as of the 30 day of September 1936?

Mr. Smith: We again object on the ground that the memorandum isn't properly qualified as one which is to refresh his recollection, in that it is not shown that the supervision exercised by this witness over the preparation [218] of this memorandum developed any knowledge or information on his part of the items which went into the memorandum.

The Court: Objection overruled.

Q. Now just state how much clearing was done, referring to the memorandum, on September, on the dam site, on September 30, 1936?

A. 4.9 acres.

Q. Now take the next estimate, the next sheet—that is, for the period ending May 30, 1937?

A. That's right.

(Testimony of J. A. Barnard.)

Q. And how much had been done at that time?

A. 4.9 acres.

Q. Was any clearing or grubbing done on the dam site between September 30, 1936 and May 1, 1937?

A. No.

Q. Then take the third memorandum and tell us whether or not any clearing and grubbing was done on the dam site in the month of June 1937?

A. There was.

Q. And was Mr. Maehl at that time on your work?

A. No he wasn't.

Q. Who did that work?

A. Our own men—forces.

Q. Your own crew?

A. Yes sir.

Q. Do you know when clearing and grubbing on the dam site was finished then?

A. Yes.

Q. When was it?

A. Approximately June 30. [219]

Q. 1937?

A. 1937.

Q. And at that time do you know when Mr. Maehl was last on your job?

A. I know that it was in March 1937, I don't know the exact date.

Q. I take it then that the clearing and grubbing on that dam site was completed—how long after Mr. Maehl left there?

A. Three months.

Q. And by whom?

A. Our forces.

Q. Now Mr. Barnard do you recall that there was some grubbing done on the reservoir site?

(Testimony of J. A. Barnard.)

A. Yes.

Q. Was that in what you call a borrow pit?

A. Yes.

Q. Who did that?

A. I don't know how to answer that question; do you mean who supervised it?

Q. Well was Mr. Maehl there at any time when that was done?      A. No he was not.

Q. Who did supervise it?

A. Mr. Metcalf.

Q. And who was Mr. Metcalf?

A. The foreman.

Q. Whose foreman?      A. Our foreman.

Q. Do you know whether or not Mr. Maehl was ever there at any time while that work was being done?      A. On the reservoir? [220]

Q. Yes the reservoir borrow pit?

A. To my knowledge he never was there on that job.

Q. But the work was done under the supervision of Mr. Metcalf?      A. Yes.

Q. Do you recall when Mr. Maehl left there some time in November, when he was away?

A. Only approximately; I know it was in November, that's all I could say.

Q. Yes, you recall he did go?      A. Yes.

Q. And that he was ill?      A. Yes.

Q. Do you know when he came back?

A. Only from the—approximately—I know the exact date, from the testimony I have heard. You mean of my own knowledge?

(Testimony of J. A. Barnard.)

Q. Yes, from any information you have?

A. Yes he came back in December.

Mr. Smith: Well just a moment—

Q. He came back the 28 of December?

A. Yes that is correct.

Q. Did you at that time or shortly thereafter have any conversation with Mr. Maehl?

A. After he came back in December?

Q. Yes. A. I probably did.

Q. Do you remember discussing the clearing with him? A. Yes.

Q. And did you on January 18 make a written contract between Barnard-Curtiss Company and Maehl? [221] A. Yes we did.

Q. I have handed you this document—I will have it marked, please—now I am handing you Defendant's Exhibit 12 and I will ask you if that is the written contract which was made between Barnard-Curtiss Company and Ernest Maehl on January 18, 1937 in relation to clearing?

A. That's right, it is.

Mr. Toole: I offer the contract in evidence.

Q. I might have asked—this was signed by Mr. Maehl was it? A. It was.

Mr. Smith: We object to the introduction of Defendant's Exhibit 12 on the ground that it is not complete; the document by its terms makes it part of this contract, the contract of plans and specifications of the Water Conservation Board, and the document does not have appended to it that contract,



(Testimony of J. A. Barnard.)

and we therefore object to its introduction on the ground that it is only a part of the instrument.

Mr. Toole: If counsel wants to encumber the record I have the plans and specifications and contract of the Water Board; as a matter of fact that contract is admitted in the pleadings.

The Court: That is what I was going to inquire; isn't it set out in your second cross-complaint?

Mr. Toole: That's right; and admitted.

The Court: And admitted by the reply.

Mr. Smith: We admit the making of the contract, your Honor, but we admit the making of it as it was written and part of it being the Water Conservation Board contract.

The Court: Well I assume counsel's objection is well taken, providing: "it being clearly the intent and purpose [222] of this agreement that the party of the second part shall be subject to and bound by all of the provisions and conditions of the contract between the State of Montana and the party of the first part."——

Mr. Toole: Well I might, if your Honor please, withhold that; I have the other contracts here; and that contract is between Barnard and Curtiss and the Water Conservation Board, and the plans and specifications, or the specifications.

The Court: ——"and the party of the first part, which contract with proposals, plans and specifications covering said project are hereby made a binding part of this agreement." It seems to be very

(Testimony of J. A. Barnard.)

necessary to show completely what the contract was.

Mr. Toole: Yes, I will proceed with this one then, first.

Q. Mr Barnard did you at that time get a contract with the Montana Water Conservation Board for the construction of the Flint Creek project, did you?      A. We did.

Q. That contract had been signed and executed and was performed by you?

A. That's right.

Mr. Toole: May I now have this marked please.

Q. Now I am handing you the Defendant's Exhibit 13 and I will ask you if that is the original contract and all of the specifications and agreements and plans for doing the work on the Flint Creek project referred to in the contract of January 18 with Mr. Maehl?

A. As near as I can tell it is. [223]

Q. Well you know it is?

A. I know it is, yes.

Q. It bears your signature?      A. Yes sir.

Q. The signatures of the members of the Montana Water Conservation Board?

A. Yes sir.

Q. And contains everything that was agreed upon before you signed it?      A. It does.

Q. The method of doing the work and that sort of thing?      A. That's right.

Mr. Toole: Now I offer Defendant's Exhibit 13.

Mr. Smith: We have no objection to it.

(Testimony of J. A. Barnard.)

The Court: It will be admitted without objection.

And thereupon was received in evidence without objection the document referred to, which is identified as and marked Defendant's Exhibit 13. The said exhibit is on file with the original exhibits in this case and is to be certified as an original exhibit in this record, and reference is hereby made to said exhibit.

Mr. Smith: This is in conjunction with the——

Mr. Toole: ——Well now I offer the other exhibit.

Mr. Smith: We have no objection to Exhibits 12 and 13.

The Court: It appears to me it is only encumbering the record with 12.

Mr. Toole: I'm sure about that.

The Court: It is admitted in the pleadings.

Mr. Toole: That's right, it is admitted in the pleadings; I didn't want to put it in but counsel wanted that it [224] should go in. Now is that admitted, Exhibit 12?

The Court: It was admitted without objection, as I understood it, 12 and 13.

Thereupon without objection was received in evidence the document referred to, which has been identified as and marked Defendant's Exhibit 12, and which is as follows:

[Clerk's Note: Defendant's Exhibit 12, Clearing Contract, is already set forth as Exhibit "A" to the

(Testimony of J. A. Barnard.)

Answer at page 30 of this printed record and is here omitted to avoid duplication.] [225]

And the Defendant's Exhibit 12 was thereupon read to the jury by counsel.

Q. This contract refers to 50 acres of clearing and grubbing—does it say grubbing, or is that clearing?      A. Clearing only.

Q. That contract refers to 50 acres of clearing; now state whether or not the 50 acres of clearing referred to in that contract was any part of the clearing referred to as the 118 acres in these proceedings?

A. Well I'm not sure as I know what part the 118 acres exactly encompassed but this 50 acres was a separate part to any other clearing that was done.

Q. Separate and apart from any other clearing that was done under the supervision of Mr. Maehl or Mr. Metcalf?      A. Yes.

Q. And now I will ask you what Mr. Maehl did with respect to that particular contract?

A. Partially completed it.

Q. Did he clear about 24 acres of it?

A. Yes.

Q. Do you recall whether he partially cleared any further amount?

A. Yes I think he did, he partially cleared some additionally.

Q. Mr. Barnard it is alleged in your counter claim in this action, with respect to that contract, that he cleared 24 acres, and then it is alleged in his

(Testimony of J. A. Barnard.)

reply that he cleared 24 acres and partially cleared 12; would you say that is some place close to the amount of work done?           A. I think it is.

Q. And why, if you know, was it that nothing further was [228] done under that contract?

A. Well the progress was so far from satisfactory, the job threatened to not be completed by the time set out, and the cost was running so high, that we figured the management was bad, and it was impossible to continue, under those conditions.

Mr. Smith: I now ask your Honor, that the last answer of the witness be stricken on the grounds that it is incompetent, irrelevant and immaterial; the pleadings allege that the contract was breached and that Mr. Maehl refused to proceed with it; apparently the witness is now about to testify and has partially testified, that the company took over the contract in accordance with one of the provisions in the contract allowing them to take it over in the event the work was not proceeding satisfactorily to them; there is no allegation in the *complaint* to the effect that the work was not progressing satisfactorily or that they exercised that right given them by the contract, the pleadings simply allege that Ernest Maehl abandoned and breached the contract.

The Court: It was insufficiently pleaded but you didn't object to it. Overruled.

Mr. Smith: May we have an exception?

The Court: The exception will be noted.

(Testimony of J. A. Barnard.)

Q. Now were you there yourself at the time that the work stopped on that contract, Mr. Barnard?

A. No, not at the exact time, I wasn't there.

Q. Who paid the men that Mr. Maehl worked under that contract?

A. Barnard-Curtiss Company.

Q. And have you gone through the books of the Barnard- [229] Curtiss Company with your book-keeper and made a computation as to the sums of money which were paid out by Barnard-Curtiss Company in connection with the performance of that contract where the 24 acres was being cleared up and while Mr. Maehl was there?

A. Yes I have.

Q. Now just detail how much money Barnard-Curtiss Company paid, the total amount?

Mr. Smith: Just a moment.

Mr. Toole: Well I haven't finished yet.

Q. (continued) In the nature of payrolls, social security, compensation insurance, bond, office expense, liability insurance, and items of that kind—have you all that, as listed in the contract here—during the time while Mr. Maehl was there clearing the 24 acres and partially clearing the balance of the 12 acres?

Mr. Smith: At this time we object to the witness testifying from this memorandum; apparently it is a memorandum taken from the books of the company; the books have not been qualified as proper account books, under the rule, as to the foundation

(Testimony of J. A. Barnard.)

to be laid for them, and it is not shown that the books are available for examination. I may state to counsel that I wouldn't object, if the books were properly qualified and if the books are available for inspection, object to a summary of this character, but I do object at this time on the grounds stated.

Mr. Toole: Well I will state to the court—of course we had a motion on that evidence some time ago—we have the books here, all the books and the vouchers, and they are all available to counsel; and we also have [230] the payrolls; they are down here in a box, quite large, and we are prepared, if necessary—I just showed them to your Honor—to prove every item that is in there—

The Court: —Well he is merely asking *you qualify* the books.

Mr. Toole: Well Mr. Barnard, we will do that.

Q. The memorandum that you have in your lap, just state how it was made up, by whom and under whose direction?

A. Made up under my direction by the book-keeper.

Q. And did you personally go to your own books and vouchers, the original books and vouchers, and check back on those items?

A. I checked every item I believe, so as to testify myself that he was correct.

Q. And do you have the vouchers here in Missoula from which the items were made up on the books?      A. I have the books.

(Testimony of J. A. Barnard.)

Q. And are those——

A. ——And the payrolls.

Q. And are those items correctly entered in the book?

A. I notice one item in here—two items in here—that are blank, that are evidently no figures written in for them, so they are evidently not included in the figures.

Q. That is they are not—if there was no item of money then they are not included in the report?

A. Not included in the report.

Q. And does the memorandum you have in your hand correctly reflect the statements of those items, both as those where there is an item entered, and where there is no money entered, as shown from your book? [231]

A. That's right.

Q. And your original vouchers or bills?

A. Yes sir.

Q. And are the books and vouchers here available to be examined?

A. They are.

Q. And also the payrolls?

A. Payrolls.

Q. Now state how much money you paid on the items referred to in the contract, at the time that Mr. Maehl had cleared some 24 acres and partially cleared 12?

Mr. Smith: Just a moment; I again renew my objection on the same grounds, that the books themselves have not been qualified.

The Court: Well as a matter of procedure I think the books should be produced and marked for



(Testimony of J. A. Barnard.)

identification; then if it can be shown that the books were kept in the ordinary course of business, that the entries therein were made at the time of the transactions, that they were accurately made, and made by this witness or someone acting under his direction or by his authority, I think that is what counsel is getting at.

Mr. Smith: Yes.

Mr. Toole: Well, we will start over again.

The Court: Well let's start as the court suggests, by producing the books and having them marked for identification.

Mr. Toole: Very well we will get the books.

Q. Now Mr. Barnard these are the payrolls?

The Court: In those payrolls weren't some book [232] entries made?

Q. Did you take those from the payrolls?

A. These figures came from the books, not directly from the payrolls.

The Court: I think you should get the books and submit them to counsel.

Mr. Smith: May it please the court at this time I would like to renew a motion to strike that I made; the court has already ruled on it, but if the court will indulge me, I would like to call the court's attention to the fact that the question that was asked the witness was not indicative enough of the answer that followed that I could anticipate just what the witness would testify; consequently I waited for the answer and then asked that the motion to strike be

(Testimony of J. A. Barnard.)

made; while I realize it is purely in the discretion of the court, I would like to renew the motion.

The Court: Well the court feels that the motion comes too late; if the form of the question did not inform you sufficiently of what might be stricken you should have objected on the ground of uncertainty; having failed to do that the motion comes too late. How long will it take to make this examination? Will 15 minutes be enough?

Mr. Toole: Well it depends on how hard counsel gets.

The Court: Well that isn't a question.

Thereupon, with the usual admonition by the Court to the jury, recess was had from 2:35 to 2:50 o'clock p. m. of said day, at the end of which the trial was resumed.

Mr. Toole: Now I will state to the court that we [233] have here the Barnard and Curtiss ledger, and in addition to that we have the original payroll, and further back than that, the original timebook; and we are prepared to offer them all or to make them all available to counsel either by introducing them in evidence or in any way that counsel desires them; the reason I state that is this, that if counsel takes only the ledger that contains only the totals and it would be of no particular information to him if he wants to make an audit. What I propose to do here is to qualify them all and then perhaps let the court and counsel say as to which should be introduced.

(Testimony of J. A. Barnard.)

I'm going to offer them all, but I think that will make a tremendous record.

The Court: It will make a record that would be too cumbersome for any useful purpose.

Mr. Smith: I would be perfectly satisfied, your Honor, if each book that was used in making the computation that has been made, is properly qualified as an account book; if it can be admitted and testified that the memorandum is made from that book and if the book is made available for our inspection so we may see it, without the necessity of introducing it in evidence.

Mr. Toole: Well then, if your Honor please, I will hand Mr. Barnard the ledger.

Q. And also I will give you this same memorandum that you had, Mr. Barnard; and you have in your hand the ledger of the Barnard-Curtiss Company, one of the regular books of the company?

A. The ledger.

Q. Yes, is that the ledger, so called, of the Barnard-Curtiss Company? [234]

A. Yes.

Q. Now is that a book which is regularly kept as a practice in all of the work by Barnard-Curtiss Company?

A. This is the Flint Creek dam project ledger and is only that job.

Q. And is it the kind of book that Barnard-Curtiss Company keeps in the regular course of

(Testimony of J. A. Barnard.)

its business on that project and all other projects?

A. It is.

Q. Which would be during the period of time from the commencement of this job until the present time?

A. It was on the job the entire period of construction until it was completed and then after that it was in Minneapolis.

Q. And that is your head office, in Minneapolis?

A. Yes.

Q. And then sent from Minneapolis here by you?

A. Yes.

Q. And now with respect to the entries in the ledger, just tell us how those entries are made, that is, take the labor item for instance, is the time kept in a timebook on the job?

A. It is up to—for a short period in the beginning of the job, and that is taken from time slips and entered on the payrolls.

Q. Now are the time books and the time slips all here?           A. I think they are.

Q. So that you kept the time on this job in a small timebook, an ordinary timebook, showing the day of the week and the name of the man and the number of those working and the amount of the pay, is that right?

A. We used a system of time slips. [235]

Q. I mean at first?

A. At first the foreman kept the time in a timebook.

(Testimony of J. A. Barnard.)

Q. And then that was submitted by the foreman to your office, at the job?

A. Yes.

Q. And after October 4 I think you said that you changed to the system of time slips?

A. That's right.

Q. And each man kept his own time, did he, usually on those time slips?

A. Turned in a slip every day, and we check it and file it and enter it.

Q. Are all those time slips here in the court room?

A. The time from the time slips that the men delivered to us and signed individually are taken off by the timekeeper and entered on these time slips that we have.

Q. And are your time slips here?

A. They are all here.

Q. And from the time books and the time slips what is done with them?

A. Entered on the payrolls.

Q. And then from the payrolls where are they entered? A. In the book.

Q. And the payrolls are all here are they?

A. Yes.

Q. And then into the ledger, as you speak of?

A. Yes.

Q. Now is that all done regularly and in the course of business in your work?

(Testimony of J. A. Barnard.)

A. That's right. [236]

Q. Under whose general management and supervision is that done? A. Mine.

Q. And have you in your experience learned then that the result on the ledger is a correct result, as a result of that system? A. It is.

Q. Then does that ledger correctly reflect the items that appear upon it?

A. You mean in general or as to payrolls, now, are you speaking of?

Q. No I am just asking if the items entered on the ledger are correct? A. Yes they are.

Q. And as to the time of these entries how are they—how soon after the man works, or after the matter is determined, are the figures made or the entries made?

A. Well promptly, usually within a week, not longer than a week.

Q. And are they made either at the time of the act or event, that is, either at the time the labor is rendered or the matter determined, within a few days thereafter?

A. A few days thereafter.

Q. So that the ledger which you have in front of you is a correct—is the ledger that you have in front of you a correct business entry kept in the ordinary course of business, under your supervision, and according to the method which you have described? A. It is.

Q. Now then, did you then have your book-

(Testimony of J. A. Barnard.)

keeper, under your [237] supervision, take off the items from the ledger and put them on the yellow sheet which you have in your hand?      A. Yes.

Q. And just open that please?

A. (Witness does so)

Q. Now with respect to the item there which has to do with the expenditures made by Barnard-Curtiss Company on the first 24 acres cleared by Mr. Maehl under the written contract, 50-acre contract, plus whatever additional clearing he did—will you tell us what the total expenditures were? Now tell us, first, if those are items which were taken off of the ledger and transcribed to that sheet just for your ready reference, is that right?

A. That's right.

Mr. Smith: May I ask a question?

Mr. Toole: Yes.

Q. (Mr. Smith): Do all of the items which appear on that sheet, Mr. Barnard, appear in the ledger?

A. No they don't—they do in some form or other but not on the account that we took them from last.

Mr. Toole: I was going to ask that.

Mr. Smith: All right.

Q. The items on the sheet which you hold were transferred from the ledger, were they, for your reference?      A. Yes sir.

Q. Ready reference?      A. Yes.

Q. Now there are some items there—in the first

(Testimony of J. A. Barnard.)

place I notice two items on the sheet, which have just a blank line?      A. Yes. [238]

Q. How do you explain that?

A. There had been no figure allocated to this record account from any of the other expense accounts, apparently, so that we left it off.

Q. Where is the first item on—now have in mind we are talking now about the time when Mr. Maehl was on the job, not after he left—what is the first item there?      A. Labor.

Q. Is the item of labor a book item taken off of the ledger?      A. Yes.

Q. And how much is it?      A. \$4301.30.

Q. Then as I understand you Barnard-Curtiss Company paid \$4301 in labor for—\$4301.30 in labor—on the 24 acres that Mr. Maehl cleared and where he partially cleared another 12 acres?

A. That's right.

Q. And what is the next item?

A. Compensation insurance.

Q. And is that an item that is in your ledger?

A. It is, under the head of compensation insurance.

Q. Tell me whether or not it appears in your ledger in exactly the amount that appears on the yellow sheet?      A. No.

Q. And why is that?

A. Well it was a flat rate applied to all labor, and we when we used the rate reduced the total amount of labor to arrive at the figure.



(Testimony of J. A. Barnard.)

Q. Yes. Now calling your attention, for instance, to [239] the contract between you and the State Water Board, Defendant's Exhibit 13, is there a clause in that contract which requires you to carry compensation insurance? A. There is.

Q. Not only upon your own help but on those of sub contractors? A. There is.

Q. And so were you carrying that compensation, workmen's compensation insurance, upon the employees who were working for Mr. Maehl under the written contract of January 18?

A. We were.

Q. And is the compensation insurance correctly, the total amount of compensation insurance, correctly detailed upon your ledger? A. Yes.

Q. And that was the total amount for the whole job, is that so?

A. That is the total amount for the whole job.

Q. Then did you allocate some proportion of the amount of that to Mr. Maehl's employees?

A. I did.

Q. And how much did you allocate?

A. This carries \$193.18.

Q. Does \$193.18 represent that proportion of the total compensation premium which Mr. Maehl's employees—the pay of Mr. Maehl's employees—bears to the total payroll?

A. May I have that question again.

Mr. Toole: Just strike that question.

(Testimony of J. A. Barnard.)

Q. Was that a proportionate allocation on Mr. Maehl's employees? [240]

A. This figure represents both compensation and public liability.

Q. Well was there a provision also in the contract that requires you to keep public liability insurance?      A. Yes.

Q. On sub contractors as well?      A. Yes.

Q. Well then is that item of \$193.18 a proportionate allocation as against Mr. Maehl's share or part of the entire job?

A. It should be correct.

Q. What is the next item?

A. Feed and tools.

Q. Have you an entry on your ledger for that amount?      A. I will have to look.

Q. Well can you find it?

A. I think I can.

Q. See if this will help you any?

A. These figures that you are asking me about is \$55.48, is evidently made up of several items off of the ledger here and added up on this here.

Q. They appear on the ledger do they?

A. They appear on the ledger in various smaller items but they are added up on here.

Q. And the total amount of that item is \$55.48?

A. The total amount of that item is \$55.48?

Q. And what is the next item?

A. Rental of horses.

(Testimony of J. A. Barnard.)

Q. Did you rent some horses up there or rent them, turn them over to Mr. Maehl, and pay the rent on them? [241]

A. Yes.

Q. How much did that amount to?

A. That amounts to \$50.84.

Q. What is the next item—that appears on the ledger?

A. In various items the same as the former one, added up.

Q. Now what is the next item?

A. Labor bond.

Q. And tell us what a labor bond is?

A. Well it is a requirement of the Water Board that we have to furnish.

Q. And does it appear in the contract between yourself, Barnard-Curtiss Company, and the Water Board, that labor bond?      A. Yes.

Q. In fact it is a part of that contract isn't it?

A. Yes.

Q. Requiring you to procure a labor bond to guarantee the payment of wages?

A. Yes sir.

Q. How much is that?

A. That is one percent of the \$4301—\$43.00.

Q. That is, one percent of the payroll?

A. Yes.

Q. And that percentage was taken on the men employed by Mr. Maehl, is that right?

(Testimony of J. A. Barnard.)

A. That's right.

Q. What is the next item?           A. That's all.

Q. And what is the total?

A. \$4779.84. [242]

Q. Well then as I understand you, Barnard-Curtiss Company during the time while Mr. Maehl was clearing the 24 acres and part of a few other more acres, advanced for his account or paid those items of his labor and under the contract—under his contract?           A. Right.

Q. Now did Mr. Maehl then finish that contract?           A. No he didn't.

Q. I think you said that things weren't going right, or something like that—

Mr. Smith: —Object to any further evidence on this line on the ground that it is incompetent, irrelevant and immaterial and an attempt to show the exercise of a right by Barnard-Curtiss under the provisions of the contract when the same is not pleaded.

The Court: Objection overruled.

Mr. Smith: May we have an exception?

The Court: Surely.

Q. Then after Mr. Maehl left there what happened to that 50 acres of clearing?

A. We finished the job.

Q. You say we—who?

A. Barnard-Curtiss Company, yes.

Q. And have you a record as to how much was expended by you in finishing that job?

(Testimony of J. A. Barnard.)

A. Yes.

Q. Where is that?

A. Well I have drawn it off here—had it drawn off on this sheet here.

Q. Have you done about the same thing with that that you [243] did in the first part of the work?

A. Yes.

Q. That is do you show a series of items showing the expenditures of Barnard-Curtiss Company in order to finish the job after Mr. Maehl left?

A. Yes.

Q. And are those items taken from your ledger in the same way as the items you have just testified to?      A. In the same manner.

Q. And how much money did Barnard-Curtiss Company expend in completing the job, in completing that 50 acres of clearing?

A. This part?

Q. Yes.

A. \$6862.85 was taken off of the books.

Q. \$66——

A. ——\$6862.85.

Q. Now tell me again what the total was, paid out during the time when Mr. Maehl was on the job?

A. \$4779.84.

Q. Have you ever totalled those two?

A. No.

The Court: Those are all the figures set out in paragraph 2 of your second affirmative defense?

(Testimony of J. A. Barnard.)

Mr. Toole: That is correct your Honor.

Q. Well Mr. Barnard I made a rapid calculation and added those two figures, but they appear to me to add to \$11,642.69; will you do that?

A. I got \$11,642.69.

Q. Well now tell me then what is the total amount of money [244] expended by Barnard and Curtiss as shown by your sheets for both including the money advanced or paid out while Mr. Maehl was there, plus the money expended by Barnard and Curtiss Company on that 50 acres after he left?

A. \$11,642.69.

Q. Right. And Mr. Maehl had the contract for \$100.00 an acre, did he not?

A. That's right.

Q. There were 50 acres, you say?

A. Approximately.

Q. Now multiply 50 by 100, what do you get?

A. 5000.

Q. Had Mr. Maehl finished the contract at \$100.00 an acre Barnard-Curtiss Company would have spent how much? What would it have cost, under the contract?

A. About \$5000.00.

Q. And now make a calculation and tell me how much the excess was expended by you on that 50 acres over and above the contract price?

A. Well I would say the difference between \$5000.00 and the \$11,642.69 would be \$6642.69.

Q. \$6642.61?

A. Yes.

(Testimony of J. A. Barnard.)

Q. Would be the amount expended by you on that 50 acres in excess of the contract price, is that right?      A. That's right.

Q. Now you testified Mr. Barnard that—or did you—what was your conversation with Mr. Maehl with respect to clearing on the dam site?

Mr. Smith: Objected to as repetition; the matter [245] was covered this morning.

Mr. Toole: Well if your Honor please there is an allegation in the answer that the clearing on the dam site, that 6 or 7½ acres, was a separate contract from the other, and Mr. Maehl apparently takes the position that it was not separate; I think we should be permitted to show it was a separate contract and that we had to go in and do that also.

The Court: Yes it is a part of your first counter claim. The objection is overruled.

Q. Did you have a conversation with Mr. Maehl with respect to clearing on the dam site alone—

A. —I don't think so.

Mr. Toole: Well I think then, if your Honor please, that in view of that we ought to dismiss that first counter claim on the \$754.00.

The Court: Well on motion of the defendant his first counter claim is dismissed. I take it you have no objection?

Mr. Smith: We have no objection.

The Court: With the consent or by the consent of the plaintiff.

(Testimony of J. A. Barnard.)

Mr. Smith: Turn about is fair play.

Mr. Toole: Now I think I should offer in evidence, if counsel wants them, the payrolls, all of the payrolls on the project; do you want those in the record?

Mr. Smith: If you will just leave them here so that we can look at them that will be satisfactory.

The Court: The court wouldn't care to have all that mass of papers introduced in evidence. [246]

Mr. Toole: Then, if your Honor please, the ledger, we won't offer that now unless counsel wants it; we will make it available to them, though, and give it to counsel.

The Court: Well now while we are at this point—because of the limited help in the clerk's office it will not be possible for the court to require anyone from that office to remain here; will it be agreeable to counsel that these papers are kept open to their inspection in Mr. Toole's office or would it be agreeable to Mr. Toole and the defendant here to have these papers and books delivered to Mr. Smith or the attorneys for the plaintiff, or can we put them in some place agreeable to both where they will be subject to inspection by either?

Mr. Toole: I think that will be best; I don't like to have them there, there are so many of them, not because I don't trust counsel but if some were lost I believe we would wonder where they went; we might leave them in Murphy and Whitlock's office.



(Testimony of J. A. Barnard.)

The Court: What would Murphy and Whitlock think about that? Well in the meantime agree on some place of deposit so that we may make a proper order. Proceed.

Mr. Toole: Well I think that's all for Mr. Barnard just now; I might want to call him back.

The Court: Very well, under proper showing and request you may recall him. Cross examine.

Cross Examination

By Mr. Russell Smith:

Q. You first talked with Mr. Maehl about the clearing matter in 1938, as I understand you—1935? A. 1935 yes. [247]

Q. And at that time you went up to the dam and more or less looked the job over? A. Yes.

Q. Do you know, Mr. Barnard, if there was any grubbing specifically noted in the Water Conservation Board contract at that time?

A. There was.

Q. There was some? A. There was.

Q. That was in 1935? A. Yes.

Q. And then events so transpired that you didn't get the contract in 1935? A. That's right.

Q. And you subsequently learned that the contract was being readvertised and new bids would be accepted? A. Yes.

Q. So in 1935 you—or 1936, and about August—would that be correct?

A. I think substantially so.

(Testimony of J. A. Barnard.)

Q. You saw Mr. Maehl up on the West Fork?

A. It might have been July, but somewhere along in there.

Q. And as I recall you said that you asked him if he was still interested in clearing?

A. Yes.

Q. And he said yes; and that conversation took place before you made your bid to the State Water Conservation Board didn't it?      A. Yes.

Q. Then subsequent to that when you had your conversation [248] you made your bid to the Water Conservation Board and it was accepted?

A. Yes.

Q. And you then got in touch with your brother Bob?      A. That's right.

Q. Or Robert, and told him to have Mr. Maehl get busy at the dam site, is that a fact?

A. Yes.

Q. I think you said you didn't know whether it was by wire or letter?      A. To Bob?

Q. Yes.

A. I couldn't recall how it was.

Q. And I assume you don't now have the communication here, whatever it was?      A. No.

Q. You were present at the work that was going on up there, off and on during the whole course of construction, were you?      A. Yes.

Q. You would be there for a few days and go away and——      A. ——Yes.

(Testimony of J. A. Barnard.)

Q. You testified this morning, or this morning and this afternoon, about some estimate sheets; this one was introduced in evidence and I think the others were not; these estimate sheets were not necessarily a complete statement of the work done to date were they?

A. They are supposed to be accurate.

Q. Well they are the thing that you get paid your advanced payments are they not?

A. Yes. [249]

Q. And there would be no requirement that you necessarily include all the work done to any given day, would there?

A. Well we watched them pretty close.

Q. Well of course as a matter of fact in this first one——

A. ——There wasn't anything done on this one.

Q. The statement reads "On account of so little work being done"?

A. Yes, no estimation.

Q. Apparently some work had been done?

A. A little, but it wasn't worth while to estimate.

Q. So it actually wasn't necessary to report every bit of work done was it?

A. We would see that we reported practically all of the work that we had done each month.

Q. And could you, if you omitted to include work one month, include it in another month.

A. It could be.

(Testimony of J. A. Barnard.)

Q. And I suppose that was done with any work that was not reported on estimate sheet number 1?

A. If there had been some work, number one would come in the next estimate.

Q. Will you show me on these sheets, Mr. Barnard, where you took your figure with respect to the work done on the dam site?

A. The first item.

Q. Here?           A. Yes.

Q. Item number 2 united or lumped with—acre, is that?           A. That is acre.

Q. Then when was the entry made? [250]

A. That is the preliminary estimate made by the Water Board on their form and that is the original set up figure.

Q. And this?

A. Actual work done on this estimate for this period.

Q. And to date?           A. With the total.

Q. And uncompleted?

A. That is their estimate, the engineer's estimate of the amount of work still to be done.

Q. And in this particular case that was incorrect, wasn't it?           A. Well it was pretty close.

Q. Well as I understand the dam site only had 6.98 acres in it?

A. That would total up to—yes that is incorrect—that is the uncompleted figure—that is incorrect.

(Testimony of J. A. Barnard.)

Q. You have told, Mr. Barnard, about the written contract that you entered into on behalf of the construction company with Mr. Maehl and you have also testified that the matter was going too slowly to suit the company?      A. Yes.

Q. Costs were running too high?      A. Yes.

Q. Were you present at the time that anything was done with respect to computation of the job?

A. No I wasn't.

Q. Who was present at that time?

A. R. W. Barnard, Bob Barnard.

Q. Was he there all the time during that—say from January 18 to March 15 or thereabouts? [251]

A. No he wasn't.

Q. What time did the company take over the 50 acre job?

A. I think about that time, January 18—my recollection may be wrong.

Q. No I think you are mistaken, I think the contract was made about January 18, wasn't it?

Mr. Toole: That's right.

A. I may have that wrong.

Q. Yes, I think the contract was made about the 18th?

A. I would have to refer to the record to answer that question.

Q. So you don't actually know when the job was taken over by the company?

A. No I couldn't answer it without referring to the record, exactly.

(Testimony of J. A. Barnard.)

Q. Would you know approximately when that was done?

A. I would say some time in February, as near as I could say.

Q. And did you say before your brother Bob was present at that time?     A. Yes.

Q. The contract I note in the second page has a provision—"A special condition of this agreement is that if at any time in the judgment of the engineer in charge or the party of the first part . . ."; who was the engineer in charge of this job during that period of time?

A. Mr. H. A. Higgins.

Q. That is the engineer in charge of—he was in charge of the Water Conservation Board?

A. Yes sir. [252]

Q. Did you have any written communication while you were gone, with anybody at the job, with respect to the progress Mr. Maehl was making on this 50-acre job?     A. I think we did.

Q. Do you have any of that correspondence here?

A. I couldn't say unless I looked at the record again, to know definitely.

Q. And with whom would that correspondence have been?     A. Mr. Strickland.

Q. Was he advising you of the general course of the work?     A. Yes.

Q. Was Mr. Strickland at that time—what was he, a laborer?

(Testimony of J. A. Barnard.)

A. He was in charge of the job in the absence of R. W. Barnard in the month of January.

Q. Was any other person other than Mr. Strickland out there at that time?

A. Not in charge.

Q. Would you say that Mr. Strickland was superintendent?      A. Yes at that time.

Q. And he reported to you from time to time about the progress of the job?      A. Yes.

Q. And did you give Mr. Strickland any instructions as to what should be done?

A. Yes.

Q. And what were those instructions?

Mr. Toole: I think that is objected to as immaterial; it is admitted in the reply that the work was not done, and the contract provides that any amount spent in completing the job shall be charged against any sums due Mr. Maehl. [253]

Mr. Smith: Well it has gone in that the work was going too slow and the costs getting too high and I was just trying to find out the situation that existed at that time.

The Court: Overruled.

Mr. Toole: Note an exception.

The Court: Exception noted.

Q. (read by reporter) And what were those instructions?

A. That R. W. Barnard would be on the job soon and to be guided by his instructions to him.

(Testimony of J. A. Barnard.)

Q. And when did R. W. Barnard go on the job, do you know?

A. I couldn't tell you the exact date.

Q. Do you know about them?

A. It was in February.

Q. He went on the job in February; and was he there during all that time—was he there during all the time from February until the middle of March? A. Oh yes.

Q. In testifying as to the cost on the—during the time that Mr. Maehl was—had this 50-acre contract, you testified I believe that you charged him with public liability insurance and compensation insurance? A. That's right.

Q. Now the compensation insurance, is that figured on a certain percentage of this payroll?

A. It is a flat rate charged by the state.

Q. What is that rate?

A. My remembrance is it was 3½ percent.

Q. And the public liability insurance, just tell the jury what the public liability insurance covered?

[254]

Mr. Toole: I think we will object to that as hearsay, calling for a conclusion, and immaterial; the contract with the State of Montana required this firm to carry public liability insurance on itself and all of its sub contractors, and the only evidence as to what that public liability insurance is or what kind of insurance it is, would be to produce the policy.



(Testimony of J. A. Barnard.)

Mr. Smith: What I'm trying to get at, your Honor, is the basis on which the public liability insurance was allotted.

The Court: As I understand it there is an allegation made; counsel would have a right to inquire on that. Overruled.

Mr. Smith: Let me ask it this way.

Q. Public liability insurance is the type of insurance that contractors and other people carry to protect them against loss brought by third persons, is it not, in event of damages growing out of the work, or something of that sort?

A. That's right.

Q. And this charge, whatever portion of the \$193.18 that was allocated to public liability insurance, doesn't represent a definite policy taken out on Mr. Maehl's contract or by reason of his work?

A. No a general policy.

Q. And what basis did you use in making that allocation?

A. The rate named in the policy, and which was paid.

Q. Well what was the rate named in the policy based on?

A. I would have to have the papers.

Q. Have you got the policy here? [255]

A. It is here.

Whereupon with the Court's usual admonition to the jury recess was had from 3:27 until 3:45 o'clock p. m., when the trial was resumed.

(Testimony of J. A. Barnard.)

Q. I see by this public liability policy that the rates which the premium charges are based on the men employed? A. Yes.

Q. And in making your computation was the computation made on the number of men employed?

A. That's right.

Q. Now you said I believe that all of the items which appear in your memorandum from which you testified appear at some place or other in the ledger? A. Yes.

Q. And the ledger reports were taken from other papers is that true? That is, the figures which appear on the ledger were compiled from other records that you had? A. Yes that's right.

Q. And the labor would be computed from the—

A. —From the payrolls; from the paid payrolls.

Q. And these green sheets here?

A. They are the paid payrolls.

Q. When you say paid payrolls you mean the money actually paid? A. Yes.

Q. When did Barnard-Curtiss finish the clearing on this 50 acres?

A. The last of May I think, as near as I can recall, or the first of June.

Q. And at the time that Barnard-Curtiss took over this [256] job you had approximately 26 acres to clear of which 12 had been partially cleared, is that right? A. That's right.

(Testimony of J. A. Barnard.)

Q. And the cost as you gave it in the clearing of the 26 acres of which 12 had been partially cleared, was \$6642.69?

A. I think that is correct.

Q. Look at that sheet, will you, and get that?

A. \$6862.85.

Mr. Smith: I think that's all I have with this witness; I may have further questions, if we may have an opportunity to look at some of these records, if that might be understood.

The Court: Yes, you will be excused, subject to recall.

#### Redirect Examination

By Mr. Toole:

Q. Did you see the condition of the 50-acre tract after Mr. Maehl had cleared the 24 acres and part of the other?      A. Yes.

Q. What was its condition?

A. In general or in detail?

Q. Well pretty detailed?

A. Well the 12, and the part that remained uncompleted, was in very bad condition; the timber was slashed down and the snow had come up on it and it was getting to be a very tough job to dispose of it, pile it and burn it; the progress was evidently not as well along as it should be in order to complete the job in the contract time; it just didn't seem to be the proper effort of accomplishing the work there to be done, in the time we had to do it.

(Testimony of J. A. Barnard.)

Q. You were asked, just the last question, about, I think, that it cost Barnard-Curtiss Company \$6862.85 to finish clearing 26 acres, part of which had been cleared; now how do you account for that high cost, if it is a high cost?

A. Well for those reasons that I just mentioned.

Q. Well now what had actually been done, due to the trees falling?

A. The timber had all been slashed so that it was lying criss-cross all over the lot.

Witness Excused.

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### R. W. BARNARD

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

#### Direct Examination

By Mr. Toole:

Q. Your name is R. E. or Bob Barnard?

A. Yes sir, R. W.

Q. You are a brother of James Barnard who was just on the witness stand?      A. Yes.

Q. Are you employed by Barnard-Curtiss Company?      A. Yes sir.

Q. In what capacity?      A. Superintendent.

Q. Were you on the Philipsburg job a part of the time?      A. Yes sir.

Q. And are you acquainted with Ernest Maehl?

(Testimony of R. W. Barnard.)

A. Yes sir. [258]

Q. Were you there when Ernest Maehl first went to work?

A. I was there—you mean what time?

Q. Well in September of 1936?

A. Yes sir.

Q. There was introduced in evidence yesterday a document marked Defendant's Exhibit 2, bearing Mr. Maehl's signature, called assignment slip; have you seen that before?      A. Yes sir.

Q. And just state, but without stating its contents, but what it is?

A. Well it is a National Re-employment slip; every man had to have a slip and the number that he worked on the job.

Q. And on that slip, Mr. Barnard, it appears to state that he was employed as a laborer at 60 cents an hour, is that correct?

A. On the ticket here, yes, that is what it says on the ticket.

Q. And subsequently was another slip issued, a so-called re-classification slip?      A. Yes.

Q. Now that has been marked here—it was marked yesterday, as Defendant's Exhibit 3; can you identify that slip? Have you seen it before?

A. Yes sir I made it out.

Q. You made it out?      A. Yes sir.

Q. Signed it—that is your signature?

A. Yes sir.

Q. And does it have reference to Ernest Maehl?

(Testimony of R. W. Barnard.)

A. Yes sir. [259]

Q. With respect to his employment?

A. Yes.

Q. Wage rate and so forth? A. Yes.

Q. And was that on the job at West Fork?

A. That was on the dam job.

Q. That is the job we have been referring to all the time? A. (No answer)

Q. Dated September 3, 1936; and would that be about the time that Mr. Maehl had gone up there, a few days later?

A. Well that was later, he went up the 24 of August.

Q. He went up there the 24 of August; the assignment slip is dated August 20, is that right?

A. That's right.

Q. And he appeared on the 24 of August as you recall? A. Yes.

Q. And the reassignment slip which I have handed you, Exhibit 3, or reclassification slip, is dated September 3? A. That's right.

Mr. Toole: I offer Defendant's Exhibit 3.

Mr. Smith: May I ask a question?

Mr. Toole: Yes.

Q. (Mr. Smith) Did Mr. Maehl ever see this document?

A. Well in the first payroll when he wasn't classified right, he was classified as a laborer, he protested, and I had him reclassified, and had to make out the slip and the engineer in charge of the work

(Testimony of R. W. Barnard.)  
had to o. k. it—I think it is on there—Mr. Griffith  
he was the engineer on there at that time.

Mr. Smith: All right. [260]

The Court: It is in evidence without objection  
Thereupon was received in evidence without ob-  
jection the instrument referred to, identified and  
marked Defendant's Exhibit 3, read to the jury  
and the same being as follows:

DEFENDANT'S EXHIBIT 3

WPA Form RECLASSIFICATION SLIP

Employee's name—Ernest Maehl.

Identification No. 3120-116.

Address—Philipsburg, Montana.

Date—Sept. 3, 1936.

Certified from relief rolls ( )

Case No. .... Relief dist. ....

Nonrelief person (x)

Now working as Laborer Code ..... Wage rate .60  
per hour on Project No. 1009-R-)3 at Flint Creek  
Dam Granite County. A change in occupation is  
recommended for the above named person:

To Foreman Code ..... Wage rate .85 per hour.

Explanation:

(1 To Pay Roll Unit)

By R. W. BARNARD

(Foreman or Supervisor)

Approved by Clifford Griffith, Project Eng.

Effective date Sept. 1 - 1936.

This form is to be used Only for change in occu-  
pational or wage rate classification occurring during

(Testimony of R. W. Barnard.)

employment on one project. It is not to be used for transfers or reassignments. [261]

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Q. Now can you identify the signature of Mr. Griffith? Was he the engineer up there?

A. Yes.

Q. Did you have him sign that slip?

A. Yes sir.

Q. And at the time that that was signed was Mr. Maehl then transferred on your payroll from a laborer to a foreman?

A. Yes sir.

Q. And from that time on carried as foreman at 85 cents per hour?

A. Yes sir.

Q. Up to that time—that is, from the time he went up there on August 24—I take it, until the date of that reclassification, September 1, he worked at 60 cents an hour?

A. That's right.

Q. Tell me how it came about that that reclassification slip was issued?

A. Well he had been working under a foreman at 85 cents an hour, before, in other work.

Q. When you say other work what do you mean?

A. Well road work.

Q. Over on West Fork road job?

A. Yes, and in some way in the first slip there was a mistake, he got put down as a laborer instead of foreman, so we reclassified him to the proper assignment in the payroll.



(Testimony of R. W. Barnard.)

Q. And how did you come to do that, did you have a conversation with him about it?

A. Yes he wasn't used to getting paid 60 cents an hour.

Q. Just tell us what the conversation was, when it was and where it was? [262]

A. Well as I remember it was when the first payroll checks came out, his check was on a labor rate and there was a protest made.

Q. Well who made the protest?

A. I think Mr. Maehl did.

Q. Do you remember what he said?

A. No I don't.

Q. About what he said?

A. Well I imagine there was a wrong rate.

Q. Did he say it to you?

A. Well I couldn't say; we had a bookkeeper there.

Q. Did you sign a reclassification slip?

A. At that time I was notified and I went in and reclassified him.

Q. And assigned him a job as foreman?

A. Yes.

Q. You yourself signed that slip reclassifying him? A. Yes.

Q. Then you were up there on the job when he first went out on it along August 24; and state what Mr. Maehl did, actually what work he did, from August 24 until September 11?

(Testimony of R. W. Barnard.)

A. Well he started clearing and grubbing the dam site August 24.

Q. Did he take a crew of men up there?

A. Yes sir.

Q. And have you looked through these payrolls to see if you could find those particular payrolls where he appeared there on that work?

A. Well it was the first payroll on the job. [263]

Q. And how long a time was he engaged upon the work on the dam site?

A. I would say around three weeks.

Q. Do you recall that it was until September 11?

A. Well it was in there some time.

Q. Then what happened?

A. Well we had to remove him, another camp at the road job over at the dam, and we sent him over there to set up the camps.

Q. To set up the camps where?

A. At the dam site.

Q. And did he go to work then putting up camps at the dam site?

A. No, back of the dam site, at the camp site.

Q. And how long was he occupied at that, do you know?

A. Well he worked there until he became ill.

Q. Was he carried on the payroll at 85 cents an hour during that period?

A. Yes.

Q. And you say he worked there until he became ill?

A. Yes.

(Testimony of R. W. Barnard.)

Q. About when would that have been, do you know?

A. Well I think it was around November 9.

Q. You heard that said here yesterday; does that fit your recollection all right?      A. Yes.

Q. And then where did he go, do you know?

A. Well he was over at the hospital in Butte.

Q. And when was the last time you saw him up there at the camp site where he was building camps? [264]

Mr. Toole: I will withdraw that.

Q. That is, do you know that he was there building camp until he became ill?      A. Yes.

Q. About November 9?      A. Yes.

Q. And then went to the hospital in Butte?

A. Yes.

Q. And when did you next see him?

A. Well I saw him in the hospital there.

Q. And you went over to see him did you?

A. Yes.

Q. Did you have any conversation with him?

A. Well on his general health.

Q. And then did he come back to work later?

A. Yes he came on the job around December 28, after Christmas, after the holidays.

Q. Were you out there then?      A. Yes.

Q. And what did he do then?

A. He was up clearing.

Q. Well now going back to the time when he

(Testimony of R. W. Barnard.)

moved from the work on clearing the dam site and went to building camps, how much of the dam site had been cleared, do you know? Had it all been cleared?      A. No.

Q. And grubbed?      A. No.

Q. Do you know about how much of it had been?

A. Oh I would say 70 percent, somewhere in there. [265]

Q. When was the dam site finally cleared, if you know, or grubbed and wound up?

A. In May.

Q. In May of when?      A. 1937.

Q. And was Mr. Maehl on the work at that time?      A. No sir.

Q. When is the last time he was on the work?

A. Well in March.

Q. And who did the work of grubbing, finally finishing the grubbing and clearing the dam site?

A. Well the work was under the supervision of Mr. Strickland.

Q. And was he your superintendent?

A. Yes.

Q. Then was the work done by Barnard-Curtiss Company?      A. Yes.

Q. Do you recall having seen Mr. Maehl there at work on—or are you familiar with the area which is covered by the 50-acre contract, the written contract?      A. Yes.

Q. Is that an area which Mr. Metcalf ever had anything to do with, by the way?

(Testimony of R. W. Barnard.)

A. No he never was in there—on the first part of it, when we went in after Mr. Maehl went off of it, Mr. Metcalf went in under Mr. Strickland's supervision, cleaning it up and finishing the contract.

Q. Where was that?           A. On the 50 acres.

Q. But what I want to get at is whether or not the 50 [266] acres was any part of the 118 acres referred to by Mr. Maehl, or 107½ referred to by Mr. Hensolt?

A. No that was a separate piece of work altogether.

Q. And do you recall about how long Mr. Maehl spent up there on the 50 acres, under the 50-acre contract, written contract.

A. Well I came back on the job early in March, I had been away, and that was when we took it over, when I came back.

Q. What was the condition of it at that time, of that area, the 50-acre area?

A. Well a lot of timber had been slashed down and it hadn't been attended to and it hadn't been cleaned up as it was cut, and it was under a lot of snow and brush and everything together and it was in bad shape.

Q. And had that clearing on that contract, or that 50-acre contract, gone along and in the usual way, being cleared and cut as it went along?

A. Not the way we were doing it on the other jobs up there.

(Testimony of R. W. Barnard.)

Q. What was particularly different about that than the other?

A. Well no burning, there was no burning of the cut.

Q. What?

A. There was no burning of the timber as it was cut.

Q. And what was the result of that?

A. Well snow and it would get wet and be tough to burn, you have to snake it out and pile it up and it is hard to burn.

Q. And what have you to say whether or not the cutting was half of the burning off there or something?

A. Yes. [267]

Q. Tell me a little more in detail just what was wrong what had happened, what the actual physical condition there was, in more detail, in that tract when you came back there?

A. Well when the contract started there was nothing cleaned up, they just kept going ahead and the timber was down and there was not much of an attempt being made to dispose of it; the toughest job there was the burning of it.

Q. Had the burning been kept up before?

A. No.

Q. How about the other part of the clearing?

A. Well they had up there a place where the partial clearing was done some slashing of the trees up there that wasn't cleaned up, they were down and crisscrossed and hard to get at.

(Testimony of R. W. Barnard.)

Mr. Toole: Now if I may state to the court, it has not been denied and no objection has been made by counsel as to the fact that Mr. Maehl was carried on the payroll here as testified, for a while at 60 cents and for the balance of the time at 85 cents; and if the record may be made to show that he was so carried during the period August 24 to January 16, I won't put in these payrolls.

Mr. Smith: Well I think that is a fact.

The Court: Very well let the record show that it is so stipulated.

Mr. Smith: In that connection, Mr. Toole, may the record show that from January 18 until March 15 or thereabouts, he was also carried on the payroll at 85 cents an hour;

Mr. Toole: That's right, and the record may so show. [268]

### Cross Examination

By Mr. Russell Smith:

Q. You were taken sick yourself, weren't you, some time during that winter?

A. Yes around the first of January.

Q. And you were in the hospital were you?

A. Yes.

Q. And approximately how long were you there?

A. Well I left the job somewhere around the first week of January and returned I think it was the first week in March.

Q. And who was in charge of the job while you were gone? A. Oscar Strickland.

Witness Excused

## OSCAR STRICKLAND

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

## Direct Examination

By Mr. Toole:

Q. Your name is Oscar Strickland?

A. Yes sir.

Q. What is your business?

A. I am superintendent of construction for Barnard-Curtiss Company.

Q. How long have you worked for them?

A. About 20 years.

Q. Were you at any time on the Flint Creek dam job?      A. Yes sir. [269]

Q. When did you go there?

A. I went there on the 24 of December 1936.

Q. And then how long were you there after that?

A. I was there until the job was completed, I can't say the date.

Q. Well some time in the summer of 1937?

A. Well it must have been about November, whatever time that the completion was done.

Q. The fall of 1937?      A. I don't remember.

Q. You are acquainted with Ernest Maehl?

A. Yes sir.

Q. When do you recall first having seen Mr. Maehl?      A. In 1934.

Q. I was thinking about this job here?



(Testimony of Oscar Strickland.)

A. Oh, on the 24 of December 1936.

A. And did you have a conversation with him then at that time or about that time?

A. Oh just occasionally and it was on Christmas Eve and he had driven out to the job.

Q. State what was said in that conversation?

A. All I remember is that he said he was going back to work, he was feeling bad but he was able to go to work again.

Q. And did he go to work then?

A. He went to work a few days later.

Q. And how did he go to work, that is, what happened, what did he do?

A. He went out in the woods clearing.

Q. Was Mr. Metcalf there at that time?

A. Yes sir. [270]

Q. And do you know whether he and Mr. Metcalf worked on the same crew or not?

A. No they didn't.

Q. Well what happened?

A. Well Mr. Maehl took a small crew and went over in another part of the area to start work.

Q. And what did Mr. Metcalf do?

A. Mr. Metcalf kept on working where he was.

Q. With a crew?           A. With a crew.

Q. And what if you know was Mr. Metcalf doing there, what was his job?

A. He was foreman.

Q. For whom?

A. Barnard-Curtiss Company.

(Testimony of Oscar Strickland.)

Q. And were you there then when Mr. Maehl took the contract to clear the 50 acres, the written contract?

A. Yes sir.

Q. Did you have any conversation with him prior to the time that contract was taken, which had any reference to any of the work that he had been doing before, not with reference to that contract?

A. No I don't remember that.

Q. What happened then after Mr. Maehl went to work on that 50-acre tract; it is alleged in the answer and admitted in the reply, he cleared 24 acres—and is that right, do you know, is that about right?

A. That's about right.

Q. Did he clear a little more than that too?

A. Partially. [271]

Q. Well now what was the condition of that standing timber, that clearing, at the time when the 24 acres had been cleared and the other partially cleared, and Mr. Maehl had left—in some detail, Mr. Strickland?

A. Well there was a lot of timber cut down that wasn't cleaned up, it was very heavy, a lot of brush piled up, covered with snow; there wasn't enough of it cleaned up in proportion to what was down.

Q. And then what happened?

A. Just what do you mean?

Q. Well did Mr. Maehl go on with it, or what happened?

A. At what time? From when he went on until

(Testimony of Oscar Strickland.)

he got this 24 acres or thereabouts cleared up—you mean what happened then?

Q. Yes.

A. Well Mr. Barnard came back from Minneapolis.

Q. And that was Bob Barnard?

A. That was Bob Barnard; and after looking over the job and the cost, the progress, it looked pretty bad; the rest wasn't going to be done on time, the date agreed on, and also there was quite a fire hazard up in that country in the spring and they wanted to get it cleaned up, and at that rate, the way Mr. Maehl was going it wasn't possible to get it done.

Q. Have you seen a good deal of clearing done in your day, Mr. Strickland?      A. Yes I have.

Q. On dams?      A. Yes.

Q. Around Montana? [272]      A. Yes.

Q. And what have you to say as to whether the methods used by Mr. Maehl were such as to carry out a contract of that kind on time and efficiently?

A. I don't think they were right.

Q. Now as to the dam site, was any work done on the clearing and grubbing of the dam site after you got there?      A. Yes sir.

Q. And when was that?

A. That was in the spring, I can't remember the exact date, I would say possibly about April.

Q. And was Mr. Maehl there at that time?

A. No sir.

(Testimony of Oscar Strickland.)

Q. What did you have to do with that if anything?

A. I had to clean it all up in preparation for the foundation of the dam.

Q. When you say clean it all up, now, with particular reference to clearing and grubbing, state what you did in the spring of 1937?

A. Well the clearing was all done, that is, the trees were knocked down and most of the brush burned up, and it was partly grubbed, the small stuff that could be pulled with a team and small tractor was grubbed, but the big stumps were there and also the piles from these stumps that had been grubbed out, they were not burned.

Q. When was that done?

A. As I remember that started in about April.

Q. Of 1937?           A. Of 1937.

Q. Was that, as I asked before, was that after Mr. Maehl [273] had gone?           A. Yes.

Q. Was that done by Barnard-Curtiss Company?

A. Yes.

Mr. Toole: I think that's all.

#### Cross Examination

By Mr. Russell Smith:

Q. You have been working for Barnard-Curtiss for 20 years?           A. Yes sir.

Q. And you came to this job on the 24 of December did you say?           A. Yes sir.

(Testimony of Oscar Strickland.)

Q. Christmas Eve I believe? A. Yes sir.

Q. Was Bob Barnard there at the time you got there? A. Yes sir.

Q. And how long did he stay there?

A. About a week, as I remember, about a week, I don't remember the exact dates.

Q. What happened to him then?

A. He had to go to Minneapolis to have an operation.

Q. And about approximately how long was he gone? A. About two months.

Q. And who was in charge of that work up there while he was gone? A. I was.

Q. Was there any other officer of the company up there during that time?

A. Mr. J. A. Barnard was there oh, three or four times, he was in and out of there. [274]

Q. There was nobody resident on the job except yourself? A. That's all.

Q. When did you start putting dirt in the dam site?

A. I didn't start it, it was started the fall before I was there.

Q. That is, it was started some time prior to the 24 of December? A. Yes.

Q. And how much of that had been completed by the time you got there?

A. I can't say, possibly ten percent.

Q. And did that work of putting dirt in the dam-site go forward after you got there?

A. No sir.

(Testimony of Oscar Strickland.)

Q. When did they then do any work on the dam-site after you got there, let's say up until the first of the year? A. No.

Q. And when did they recommence work on the dam-site in putting dirt in it?

A. It must have been the latter part of June.

Mr. Smith: I think that's all.

#### Redirect Examination

By Mr. Toole:

Q. Did the grubbing that was done on the dam-site in the spring delay the work of putting the dirt in the dam-site? A. No sir.

Q. And while you said there was dirt put in the dam-site in the fall there was none put in the area that you grubbed in the spring was there?

A. No. [275]

Q. Was it on the far side of the dam-site or something like that?

A. No the dirt that was put in was down in the bottom; the clearing and grubbing that was left was higher up on the hill on both sides.

Mr. Toole: That's all.

#### Recross Examination

By Mr. Smith:

Q. Did you have anything to do with these periodic estimates?

A. No sir, and more than I checked them over and they were sent to Minneapolis, sent to Mr. Barnard.

Mr. Smith: That's all.

Witness Excused.

Mr. Toole: I would like to call Mr. J. A. Barnard back for one question which I should have asked him on redirect examination, if your Honor please.

The Court: Very well.

And thereupon

J. A. BARNARD,

a witness for the defendant, was recalled and testified as follows:

Redirect Examination

(continued)

By Mr. Toole:

Q. Mr. Barnard in your cross examination, referring to these progress estimates, you were asked with respect to the various columns; you stated that the column containing the words "Detailed estimate" was not so very accurate, or words to that effect, did you not?      A. That's right. [276]

Q. And that the column "Percentage of completion" was not very accurate?      A. That's right.

Q. What have you to say to the accuracy of the column, "Price estimate," as to the accuracy of that column?

A. I think that would be fairly accurate—quite accurate.

Q. And why?

A. We would see to it that we got paid for what was due up to that date.

Q. That is what you were being paid on?

A. That's right.

(Testimony of J. A. Barnard.)

Q. And you checked the accuracy of that, did you?  
A. Yes sir.

Q. And the other columns were the estimates of the engineer's original plan as I understand?

A. That's right.

Mr. Toole: That's all I think.

Witness excused.

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C. A. METCALF

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination

By Mr. Toole:

Q. Your name is C. A. Metcalf?  
A. Yes sir.

Q. Where do you live?  
A. Philipsburg.

Q. How long have you lived there? [277]

A. About 50 years.

Q. Oh, you must have been born there. Are you acquainted with Mr. Maehl?  
A. I am.

Q. Did you go with Bob Barnard and Jim Barnard and Mr. Maehl up to the Flint Creek dam site some time in 1935?  
A. Yes sir.

Q. What was the purpose in going up there, Mr. Metcalf?

A. Well we went up to look at the timber, figuring on an estimate of what we could cut it for under a contract.



(Testimony of C. A. Metcalf.)

Q. And did you have a conversation at that time with J. A. or Jim Barnard? A. Yes sir.

Q. And was Mr. Maehl present? A. Yes sir.

Q. Will you state what that conversation was?

A. Well Mr. Jim Barnard talked to us about cutting the timber and wanted to know what kind of a contract we would be willing to take, how much we could cut that timber for.

Q. When you say we whom do you mean?

A. Mr. Maehl and I.

Q. Who was the conversation directed to, both of you or one of you or one at a time, or how was it?

A. I should say both of us.

Q. Now go ahead. Wanted to know how much you would take it for and how much you would cut it for? A. Yes sir.

Q. And what further was said?

A. Well we had talked it over before and then after we looked at it we decided we could cut it for \$100.00 an acre. [278]

Q. And did you then at that time, you and Mr. Maehl, agree to take the contract for \$100.00 an acre for that clearing?

A. Well the contract wasn't let; that was just an estimate we made, what we thought we could cut it for.

Q. When you said the contract wasn't let you mean Barnard and Curtiss didn't get the contract for the dam? A. Yes sir.

(Testimony of C. A. Metcalf.)

Q. And the contract was not let to Barnard and Curtiss Company, is that right?

A. Not at that time, no.

Q. And was anything further said up there particularly about a contract between you two and Mr. Barnard—the Barnard-Curtiss Company—on it, or was it just that conversation about as you stated?

A. Oh just a conversation with all four of us, so far as that goes, about the cutting of the timber there, what we thought we could cut it for, and things of that sort.

Q. Do you recall at any time Mr. Maehl stating that he would take the contract for \$100.00 an acre—he personally?

A. No not personally.

Q. And you came back then to Philipsburg after that, all four of you?

A. Yes sir.

Q. But Barnard-Curtiss Company didn't get the job that summer, it went to Inland Construction Company as low bidder?

A. Yes sir.

Q. And that fell through didn't it?

A. Yes sir.

Q. Subsequently did you have a conversation with Mr. Maehl about the work on the project or the clearing? Did you [279] talk with Mr. Maehl about it?

A. After that?

Q. After that?

A. Yes we talked more or less about it, we were working together at the time.

Q. When is the first time you talked with Mr. Maehl after the conversation up at the dam site in 1935, about when?

(Testimony of C. A. Metcalf.)

A. Oh I don't know, we had several conversations about cutting it, we would cut it at \$100.00.

Q. Yes if you had a conversation, if you remember?      A. Oh I don't remember.

Q. Well did you have any more conversations with him at all?

A. Right at that same time, just after Mr. Barnard left, or anything like that?

Q. Well at any time?

A. Oh yes there were other conversations about it.

Q. Now tell me as nearly as you can when the first of those conversations occurred?

A. Between Maehl and I?

Q. Yes.

A. Well we had talked about it when the job was going to be let, of trying to get a contract on it.

Q. That was in 1936?

A. Well 1935 first, when they were advertising the job, we had talked about whoever got it, trying to get a contract if we could.

Q. That is when they were advertising it the second time?

A. The first time and also the second time too.

Q. Well but I was thinking about the conversation after [280] that, after you had been up and looked at it, did you talk with Mr. Maehl then?

A. Yes we talked at different times.

Q. And tell me what was said at those conversations?

(Testimony of C. A. Metcalf.)

A. Well I don't know, just kind of a general conversation about taking the contract there; I don't remember the exact words or just what it was; we talked at various times about it.

Q. Well would you have said, for instance——

Mr. Smith: Just a minute——

Q. (continuing): —would you have said “Maehl”  
—what do you call him, Ernest?      A. Ernie.

Q. (continued): “Ernie, let's you and I go and get a contract from Barnard and Curtiss on this clearing?”

Mr. Smith: We object to that.

The Court: I don't know what the answer could be; I think you had better inquire what, if anything, was said between them on that subject.

Mr. Toole: Well I have a statement I want to make to the court in connection with this; I would just as soon make it in the presence of the jury, and I don't care about making a statement of the testimony, myself, before the jury; I want to demonstrate to the court that this is an unwilling witness, one whom I have a right to ask rather pointedly with respect to those conversations.

The Court: Well I expect it would be better to excuse the jury while you make that statement. And thereupon, being duly admonished by the court, the jury was excused and withdrew from the court room. [281]

Mr. Toole: What I had in mind was this, your Honor, as your Honor will recall there was a motion

(Testimony of C. A. Metcalf.)

filed to join Mr. Metcalf as a third party in this case. Mr. Maehl has testified that Mr. Metcalf was sent up there as a foreman while he was away; and I have here the pleadings signed by the witness wherein he alleges that he had a contract for this clearing and wherein he is suing Barnard-Curtiss Company in the state courts upon the same cause of action as that sued upon here, and I think it becomes material to both court and the jury to now find out, or permit me to ask this witness directly on the point as to whether or not he does have such a contract or at least what conversations were had between him and Barnard and Curtiss as would indicate some contract; I didn't want to ask those questions before the jury, but I think that it is clear that we couldn't expect Mr. Metcalf to testify as to the existence of a contract between himself—or, that is—of the existence of a partnership between himself and Maehl, which is inconsistent with the pleadings in the two cases which he has filed; and that is the reason for that request.

Mr. Smith: Of course it is our position, after all, the mere fact that this witness may have had a contract with Barnard-Curtiss on this same contract is not evidence that Maehl did not have a contract, and then of course we specifically object, not so much to the nature of the question asked, as to its materiality, and counsel has not yet shown sufficiently from this witness to warrant leading him, under the provisions of our Code.

(Testimony of C. A. Metcalf.)

Mr. Toole: Well I just wanted to show that this witness is an unwilling witness, by his pleadings in the other [282] case.

The Court: Well it is undoubtedly the rule that where a person is shown to be adverse the party examining him may ask leading questions; it would probably cause a state of mind on the part of the jury which would be adverse to the plaintiff—not the plaintiff here—on the showing that he is also suing for the same work. Well how about it, Mr. Metcalf, were you claiming for cutting the same timber that Mr. Maehl is claiming?

The Witness: Yes.

The Court: The same identical land or part of it?

The Witness: Most of it yes.

The Court: Most of it is the same?

The Witness: Yes.

The Court: What, if any effect, has that upon your mind, with reference to Maehl's claim?

The Witness: Nothing only just as I say it.

The Court: Well were you and he operating together at that time?

The Witness: I contend that I done all the operating, I done all the work; we had an agreement whereby we would do this work together, and I done all the work.

The Court: In other words your contention is that the agreement was between the defendant Barnard-Curtiss Company and you and Maehl?

The Witness: Originally, yes.

(Testimony of C. A. Metcalf.)

The Court: When was that contract made?

The Witness: Oh some time in 1936, the fall of 1936.

The Court: And your contention is that you did all the work? [283]

The Witness: Yes sir.

The Court: And now he wants half of the money?

The Witness: That's it exactly.

The Court: And your interest is adverse to his, then?

The Witness: He didn't live up to his agreement with me.

The Court: On the other hand he says the entire contract was with him and that you are not in it at all. I think, under that condition, it is fair to assume that the interest of this witness is adverse to the contention of both the plaintiff and the defendant in the case now on trial, and that he would be adverse, or would as a witness be adverse to the defendant in the case now on trial; and for that reason I will permit the defendant's counsel to lead and to treat the witness as one on cross examination. Call the jury.

Thereupon the jury was called into the court room and resumed their seats in the jury box.

Mr. Toole: Now if you will read the question.

Q. (read by reporter): Would you have said "Maehl"—what do you call him, Ernest?

A. Ernie.

(Testimony of C. A. Metcalf.)

Q. (continued): "Ernie, let's you and I go and get a contract from Barnard and Curtiss on this clearing?"

Q. Did you make some statement of that kind or a similar statement to Mr. Maehl after your conversation with him?      A. I think so.

Q. And subsequently did you and Mr. Maehl, operating together, make any verbal agreement as between the two of [284] you, that you would have these clearing contracts together?

A. Under certain conditions, yes.

Q. And were you ever Mr. Maehl's foreman up there?      A. No sir.

Q. State whether or not Mr. Maehl ever asked you to go up there as his foreman at the time he became ill?      A. He never did.

Q. After Mr. Maehl left, when he became ill, did you go ahead with the clearing crew?

A. I went ahead at all times down there.

Q. And were you carried on Barnard and Curtiss' payroll?

A. That was under certain conditions of ours, certain agreements, Mr. Barnard and I.

Q. And you were paid weekly by—or whenever it was?      A. Yes.

Q. Was it every two weeks?

A. Every week.

Q. By Barnard and Curtiss?      A. Yes.

Q. How much—what was your rate of pay?



(Testimony of C. A. Metcalf.)

A. Six bits an hour.

Q. Seventy-five cents? A. Yes.

Q. And you drew that pay regularly from Barnard and Curtiss Company? A. Yes.

Q. And when Mr. Maehl returned on the 28 of December, 1936, did you talk with him?

A. Yes sir.

Q. State what was said? [285]

A. Well he came up on the job and I had seven or eight men cutting some small timbers that they could cut with axes on a kind of a flat, and I had the sawyers over some little distance from there, probably an eighth of a mile or such a matter, cutting heavy timber, and when I started the men in the morning, the sawyers, after while I walked over to where these other men were, and Mr. Maehl was there, and we told him that he hadn't been living up to any agreement he made, that this was my contract, and he informed me—I said "You got nothing to do with it," and I informed the men they were working for me and taking their orders from me and not from Mr. Maehl, which they said "All right," and they went ahead and took their orders from me.

Q. And did it continue that way until the 16 of January when he went over on the 50-acre tract?

A. Yes; well he said "I'm going to stay here until Jim Barnard comes;" I says, "I guess I can't put you out, that is up to you, but I never hired

(Testimony of C. A. Metcalf.)

you and I'm not paying you either," and we had considerable words about it.

Q. Did you state to Mr. Maehl at that time that you had a contract with Barnard-Curtiss Company for that clearing?      A. I did.

Q. Have you sued Barnard-Curtiss Company on your contract also?      A. I have.

Q. For the same area of clearing?

A. Practically the same, yes.

Q. And do you now claim that it was your contract and not Mr. Maehl's contract?

A. I do. [286]

Q. And do you now claim that whatever understanding, if any, that was originally made, was a contract made between you and Mr. Maehl jointly, as one party, and the Barnard-Curtiss as the other party?

Mr. Smith: We object to that on the ground that it calls for a conclusion of the witness.

The Court: Yes I think it does; what his claim may be is of no importance; you may draw from him any conversation he had with Maehl or with Barnard-Curtiss or any of their agents relating to employment of the two men or employment of him alone, that is, the witness alone, to do this work. The objection will be sustained.

Mr. Toole: Note an exception.

Q. Mr. Metcalf it has been stated that there was somewhere around seven acres of clearing and grubbing on the dam site?      A. Yes sir.

(Testimony of C. A. Metcalf.)

Q. And perhaps 118, as stated by Mr. Maehl—107½, I think, was stated by Mr. Hensolt—tell us, did you have a measurement made of the area up there?      A. I did.

Q. How many acres did you find on your measurement?

Mr. Smith: Now just a moment; we object to that; the measurement of what—

Mr. Toole: Well of the area that is referred to as the Maehl clearing.

A. How many acres—I don't have an estimate of all of it, no.

Q. What estimate did you have?

Mr. Smith: Again I object to that on the ground that any estimate he may have had would not be particularly [287] material unless we find out what area he was measuring.

Mr. Toole: He was Mr. Maehl's foreman.

The Court: Well the estimate he may have made if made by others would be merely hearsay.

Q. Well did you do any measuring up there or any estimating as to the acreage that you supervised the clearing on?

A. Personally you mean?

Q. Yes.      A. Yes.

Q. What was the area, can you remember?

A. You mean the clearing and grubbing and—

Q. Just clearing.      A. All of the clearing?

Q. Yes.      A. My estimate was 108 acres.

Q. And how many acres of grubbing?

(Testimony of C. A. Metcalf.)

A. Oh about between nine and ten acres.

Q. And that was in the same area as the clearing?  
A. Yes sir.

Q. The grubbing as alleged in the complaint, the Maehl complaint, was 20 acres—he alleges 20 acres; he testified that he was not there during the winter but that you were, I think, his foreman; do you know of any 20 acres of grubbing up there within the area that Mr. Maehl referred to, or was that the 9½ acres you referred to?

A. Well that was some of it, the 9½.

Q. Was that all in the same area there?

A. That was in the dam site, the borrow pit, the 9½.

Q. The 9½ acres of grubbing was what you supervised, was it?  
A. Yes sir. [288]

Q. During the winter?  
A. Yes sir.

Q. While Mr. Maehl was away?

A. I don't know if he was away but he wasn't there when I done that grubbing, he was working on different jobs.

Q. When did you first go up there and start working on the clearing?

A. On the 7 of October.

Q. And how much time, from the time you went up there, how much time were you there until you finally left—how long were you there?

A. Oh I was there until the latter part of April—that is, on the job, you mean?

Q. Yes.  
A. On the Barnard-Curtiss job.

(Testimony of C. A. Metcalf.)

Q. And how much of that time were you supervising clearing in one capacity or another?

A. Most all the time, I guess all the time.

Q. And during that period I think you said October 24, did you say?

A. October 7 I started clearing.

Q. To April some time—what time in April?

A. I don't just remember; I quit along in April.

Q. Was Mr. Maehl there during that period of time, supervising the clearing or handling or clearing the tract or doing any clearing or managing the crews?

A. He was there from, oh, some time around the middle of January, until well, two or three months afterwards.

Q. Going back to October, do you recall what Mr. Maehl was doing when you went out there on October 7? [289]

A. He was building a camp.

Q. Did you ever see him supervising any clearing or handling any clearing at that time?

A. No sir.

Q. Did you ever see him supervise or boss or handle any clearing from October 7 until January 28 when he came back from the hospital?

A. No sir.

Q. During the time from October 7 until December 28 when Mr. Maehl came back from the hospital did you supervise the clearing for him as his foreman?

A. No sir.

(Testimony of C. A. Metcalf.)

Q. Did you see anybody else supervising clearing for Mr. Maehl as his foreman during that period?

A. No sir.

Q. From December 28 until January 16 did you see—or about the middle of January—was he out supervising any clearing?

A. Well he was out there but I was doing the supervising; I told the men that they were working for me and not for Maehl and they said all right.

Q. And during that period were you his foreman?      A. No sir.

Q. And on January 18 he moved over on to the 50-acre tract, you know that, do you? Do you know about that?      A. Yes.

Q. And from then on he went it alone under a written contract of his own, is that so?

A. Well I don't know.

Q. So far as you know?

A. So far as I know, yes. [290]

Mr. Toole: I believe that's all. That's all.

### Cross Examination

By Mr. Smith:

Q. Your interest in this matter is definitely adverse to Mr. Maehl's interest?

Mr. Toole: To that we object as calling for a conclusion.

The Court: Yes I think it is.

Q. You at the present time have a claim against

(Testimony of C. A. Metcalf.)

Barnard-Curtiss Company involving some of this same work?      A. I do.

Q. And they have denied your claim have they?

Mr. Toole: Just a minute; that is objected to——

Mr. Smith: Well your Honor——

The Court: I think that would have a bearing on plaintiff's rights, if they admit——

Mr. Toole: I want to say that isn't so, either—I mean that counsel offered that and didn't ask that the jury be excused before making that statement, as I did, and I think it should be clear, there are no denials in these files, he has sued Barnard-Curtiss and they haven't denied his claim, no answer has been filed.

The Court: Well a denial may be made without answer being filed.

Mr. Smith: I didn't ask him if he filed suit, I asked him if he claimed against them and they denied it.

The Court: Well the party against whom he made that claim, Barnard-Curtiss, denied his claim.

Mr. Toole: Well it is half true.

The Court: It might have a bearing on his claim [291] in this case, I think. Well I think we will sleep on it.

Whereupon at five o'clock p. m. of said day recess was had until ten o'clock the following day, when the trial was resumed, the court having duly admonished the jury.

(Testimony of C. A. Metcalf.)

Mr. Smith: I think when we closed last night there had been a question asked and an objection made and we had no ruling on it. I know what the question was; I will repeat it.

The Court: Very well we will start over with the question.

Q. You are the plaintiff are you not, Mr. Metcalf, as against Barnard-Curtiss, on a contract for clearing a portion of the area which has been designated here as the 118-acre area?      A. I am.

Q. And you have filed suit against Barnard-Curtiss covering that claim have you not?

A. I have.

Q. And have Barnard-Curtiss denied that claim?

Mr. Toole: Just a minute; that is objected to as immaterial.

The Court: Overruled.

Mr. Smith: Will you answer please?

A. They have.

Mr. Smith: I think that's all.

### Redirect Examination

By Mr. Toole:

Q. Well Mr. Metcalf you and your attorney were in my office the other day discussing adjustment of that claim? [292]      A. Yes sir.

Mr. Smith: We object on the ground that an offer to compromise is not admissible.

The Court: Well, the answer will be stricken.

Mr. Toole: The question wasn't as to the matter



(Testimony of C. A. Metcalf.)

of compromise but simply in rebuttal or on cross examination on the denial of the claim.

The Court: You were having a conference on the settlement?

Mr. Toole: We were having a conference on the suit that Mr. Smith just referred to, the suit that Mr. Metcalf has against Barnard-Curtiss.

The Court: The objection will be sustained.

Mr. Toole: Mr. Metcalf, you were discussing—you and your attorney, in my office the other day, payment of your claim?

Mr. Smith: Objection on the same ground.

The Court: Objection will be sustained.

Mr. Toole: Note an exception.

The Court: Just a moment. In deciding this case, gentlemen, you will pay no attention to any question that is asked or any implication drawn from the testimony to which an objection has been sustained. I think you have gone far enough along that line. You have protected your record twice.

Mr. Toole: Mr. Metcalf, you said that Barnard and Curtiss had denied the claim. Is that really so when you say denied the claim?

A. It has never been settled at least.

Q. It has been discussed, however, recently?

[293]

A. Yes.

Q. You stated that the claim to which you referred was for a portion of the area cleared—when you say portion, what portion do you mean?

(Testimony of C. A. Metcalf.)

A. The portion that I claim.

Q. Yes?           A. The reservoir site.

Q. Your claim is for 108 acres, is that so?

A. Of the reservoir site, yes sir.

Q. And if Mr. Maehl's claim is 118 acres, yours is for 108 of that 118, is that so?           A. Yes sir.

Q. In fact your claim is for all of the acreage over which you or Maehl had supervision excepting the dam site and the 50 acre tract that he had, is that so?

A. I don't think I quite understand that question.

Q. You didn't claim anything against Barnard and Curtiss for clearing the dam site, did you?

A. No sir.

Q. But your claim is for all of the other acreage that either you or Maehl had any supervision over?

A. Well, later on I had supervision over on some other clearing.

Q. But your claim is for all of the acres except the dam site which was jointly supervised by you or Maehl or both of you, isn't that so?

A. Yes sir.

The Court: Any further questions?

Mr. Smith: That's all.

Witness excused. [294]

Mr. Toole: If your Honor please I stated yesterday that I might want to call Mr. J. A. Barnard back; I will call him back now.

The Court: Very well.

Thereupon

J. A. BARNARD

was recalled as a witness for defendant and testified as follows:

Redirect Examination

By Mr. Toole:

Q. Yesterday, Mr. Barnard, you testified concerning some \$11,000.00, something more than that, that had been expended by Barnard-Curtiss Company in connection with the 50-acre written contract, is that so—you recall that, do you? A. Yes sir.

Q. Now with respect to the clearing and grubbing on the area referred to in the complaint, state whether or not Barnard-Curtiss Company, in addition to the \$8360.30 which Mr. Maehl alleges in his complaint was expended by you, or paid to him as he says, Barnard-Curtiss Company had additional expenditures?

Mr. Smith: At this time, your Honor, we object to this question on the ground that the witness is refreshing his memory.

Mr. Toole: I was coming to that. They did have additional expenditures, did Barnard and Curtiss?

A. In addition to the money expended on the 50-acre contract?

(Testimony of J. A. Barnard.)

Q. Well in addition to the amount Mr. Maehl has said was [295] in payment of labor? A. Yes.

Q. Now you have in your hand a document or piece of paper, which is—is that the same paper from which you testified yesterday? A. Yes.

Q. Is that the paper upon which the compilations were made with respect to the expenditures on the 50-acre contract? A. Yes.

Q. In addition to those expenditures does it contain other compilations or figures? A. Yes.

Q. And do those other compilations or figures have reference to the amount of acreage referred to in the complaint? A. Partially, yes.

Q. And when you say partially, what do you mean by partially?

A. Well there is a compilation here of the dam site.

Q. Yes. Well, you recall Mr. Maehl's testimony that the dam and reservoir site were all in one?

A. Yes.

Q. Do you have figures on the sheet of paper which have reference to the dam site and the other acreage referred to by Mr. Maehl? A. Yes.

Q. And you recall that that was referred to as all in one by him? A. Yes. [296]

The Court: We will eliminate that. It is for the jury to say what Mr. Maehl said, not for you to interpret it and where it leads and it is improper form of examination, assuming that something exists or seeking as to whether a witness testified, the jury

(Testimony of J. A. Barnard.)

is the only body properly competent to judge along that line.

Mr. Toole: You have then on the memorandum figures referring to the clearing and grubbing on the area which is the dam site and the additional area except or outside of the 50 acres, have you?

A. Yes.

Q. Did you—or were those figures compiled by you from the same records—same group of records as you testified to yesterday?      A. Yes sir.

Q. And those records were records that—were they kept in the usual course of business in your office?      A. Yes sir.

Q. They are your regular books?      A. Yes sir.

Q. And do you know that the figures on the sheet which you have are correct?

A. To the best of my knowledge they are correct.

Q. They were taken off of the books which your company regularly kept?      A. Yes sir.

Q. And from the same books concerning which you gave testimony yesterday?      A. Yes sir.

Q. Now state what the items of expenditures on the payrolls [297] were in addition to the men working on that clearing—that is on the clearing aside from the 50-acre area in the written contract.

Mr. Smith: At this time, your Honor, we object to any evidence of payment on behalf of Barnard-Curtiss for the reason that the pleading contains simply a general denial. Under the law of Montana payment is an affirmative defense which must be

(Testimony of J. A. Barnard.)

pleaded and there is no pleading of payment and therefore the question and proposed answer are incompetent, irrelevant and immaterial.

The Court: The principle is correct but does it apply here? Are you contending that there have been payments?

Mr. Toole: No your Honor, we denied that there was any such contract made.

The Court: You are confining this wholly to your second counter-claim?

Mr. Toole: No, this is on plaintiff's first cause of action. The plaintiff alleges in his first cause of action that——

The Court: That he received or there was paid on account \$8360.30. You denied that there was any payment at all.

Mr. Toole: That's right. We denied the existence of any contract at all. It is a question of what was expended up there. That is what we are attempting to prove.

The Court: On account?

Mr. Toole: No.

The Court: On the other hand if it isn't intended for that purpose, it can have only one other purpose and that [298] is as to the credibility of the witness and that was covered definitely yesterday and will simply confuse the jury and now you expect to prove——

Mr. Toole: I want to state my purpose to the Court that under denial, where a contract is denied,

(Testimony of J. A. Barnard.)

under the rule of pleading where the contract is denied entirely, if plaintiff then comes into court and the Court permits plaintiff to make proof of a contract then under that general denial that such a contract was made the defendant has the right to show what was done by it and if the question of the making of the contract goes to the jury the defendant is not limited in proving what it did or what it paid out as a charge in performance of the work which defendant denies was the subject of a contract.

The Court: You have that right, yes. That is why I asked you whether this testimony was to contest the payment under the first cause of action set out in his complaint and you said no.

Mr. Toole: Maybe I didn't understand.

The Court: I may not have understood you but that was the theory. The complaint charges of course that there was an agreement under which the plaintiff was required to clear 118 acres and to grub a part of it at \$100.00 an acre. Plaintiff then claims that he performed his part of the agreement and earned \$11,800 upon which \$8360.30 has been paid, leaving a balance of \$3439.70 still due. Now as I understand it you want to show that he was paid more.

Mr. Toole: We denied that that contract was made. [299]

The Court: You denied making the payments too.

(Testimony of J. A. Barnard.)

Mr. Toole: That's right and we still deny that, but if the contract was made, your Honor——

The Court: If you wish to proceed upon that theory and prove that no payment was made upon the contract claimed in the first cause of action I think that would be proper.

Mr. Toole: Both the jury and the Court are entitled to know what——

The Court: Barnard and Curtiss have already testified that they have paid more than \$11,000.00 in the performance of the contract. That was the testimony. You may produce that testimony in support of your second counter-claim. The first was dismissed. Now you are using the same.

Mr. Toole: That isn't correct your Honor. I am sorry to be in disagreement with the Court but the claim for 118 acres is way off on one side and the claim for the 50 acres is off on the other. The \$8360.30 set up in the complaint is no part of the money that was testified to yesterday at all, not at all. It is an entirely separate and distinct proposition.

The Court: I understand that.

Mr. Toole: The plaintiff's complaint alleges the existence of a contract to clear 118 acres and the answer alleges a contract to clear 50 acres which are not any part of the 118 acres at all.

The Court: I understand that clearly. One is under a written agreement admitted by all parties; the



(Testimony of J. A. Barnard.)

other is under an oral. Are you trying to use the same [300] money twice in your proof?

Mr. Toole: Oh no, absolutely not.

Mr. Smith: I think your Honor, that it is clear that they are probably not trying to use this money twice but my position is this, that first of all under the pleadings in the first cause of action defendant denies that any contract was made and that a pleading binds a party and that he cannot by the introduction of evidence change that pleading. The second proposition is that where a payment is sought to be proved it must be set forth as an affirmative defense. Now then, there is no pleading of any payment in response to plaintiff's first cause of action. There is a denial. Now the defendant here cannot and even with other money put in issue a plea of payment which is not supported by any pleading in the allegation.

The Court: Payment is an affirmative defense which must be proved. I think I see just what counsel is trying to accomplish. It may have a bearing upon the testimony that Mr. Maehl was paid \$8360.30. They deny that and do not allege payment but it might have a bearing upon the credit of the witness and the plaintiff alleges that there is \$3439.70 due. That is denied. If they show that they in fact did pay more than \$8360.00 on that 118 acre contract it is merely showing facts contrary to the proof of the plaintiff. So we will let the evidence in.

(Testimony of J. A. Barnard.)

Mr. Smith: May it be understood that our objection goes to the whole of this testimony.

The Court: To all of the payments made except as to the payment said to have been made under the agreement set out in the further defense and second counter-claim stated in [301] the answer on file herein. That's what you wish, I take it.

Mr. Toole: Mr. Barnard, what was the payroll or the amount of money paid for labor by Barnard-Curtiss Company on that 118 acres?

A. Payroll?

Q. Payroll on that acreage?

A. Payroll only?

The Court: Well, let's see here,—the acreage,—we have here apparently three or four separate contracts. The plaintiff Maehl contends three separate tracts, the dam site, the dam and the borrow pit, 7.88 and 28 acres included in the 118. Then we have here another tract of land, 50 acres, separate and apart from that 118 so for the purpose of certainty confine the question to the payments made upon the tracts, the 118, the 50 acre tracts and the tract not included in either of those for which Mr. Metcalf makes claim.

Mr. Toole: I wouldn't like to have it understood that I think the tract contained 118 acres. I believe the proof really is that it was 107 or 108.

The Court: Then on your objection the Court struck from the testimony certain added land which

(Testimony of J. A. Barnard.)

he said had been measured by others. I think there is no confusion on that point.

Mr. Toole: Do you know how much the acreage was in that area that is in controversy, including the dam site,—perhaps it is hearsay?

A. I don't know from my own knowledge.

Q. Now take,—as the Court has said,—there are three tracts of land,—there is a tract of land on the dam site, [302] there is a tract of land which Mr. Maehl claims he had a verbal contract for and there was a tract of land of 50 acres for which he had a written contract. Leaving the written contract and that 50 acres out of consideration entirely and taking the area outside of the dam site, not including the dam site, state what the labor expended by Barnard-Curtiss was on that item.

A. Not including the dam site?

Q. Not including the dam site.

A. \$8322.57.

Q. What was the social security on that?

A. \$324.33. That's correct. That was compensation insurance I just gave you.

Q. Compensation insurance?

A. The social security was \$122.63.

Q. And was that paid by Barnard-Curtiss Company?      A. Yes sir.

Q. Now after Mr. Maehl had left the camp or was gone did you expend any further money on that?      A. We did.

Q. And what was that spent for?

(Testimony of J. A. Barnard.)

A. Cleaning up the job, finishing it.

Q. For labor?

A. Both labor and equipment.

Q. How much was that?

A. All that we have track of here which is not the entire amount, but all that we could,—was \$126.10 plus the social security.

Q. How much was the social security?

A. \$5.06. [303]

Q. And the compensation insurance?

A. \$3.78. No, that's wrong again, the compensation insurance is \$5.06 and the social security \$3.78.

Q. And did you furnish also as required by your contract with the Water Board a labor bond on that?

A. Yes sir.

Q. And what was the premium?

A. \$83.22.

Q. What expense in addition did you have on that with respect for instance to equipment?

A. We furnished or used our equipment up there in cleaning off the,—grubbing the stumps to the extent of,—do you want the amount?

Q. And what was that equipment?

A. Caterpillar tractors and,—principally caterpillar tractors, bulldozers.

Q. And what,—did you carry on your books then a value as to the use of the equipment for that period?      A. Yes sir.

Q. What was it?      A. \$322.41.

(Testimony of J. A. Barnard.)

Q. Did you,—well,—just drop that for the moment. I don't suppose you have a note of those particular items there?      A. No.

Q. Now with reference to the dam site, did Barnard and Curtiss Company expend labor or pay the labor on the dam site?      A. They did.

Q. How much did you pay on the dam site?

A. \$483.50.

Q. \$483.50? [304]

A. Yes sir.

Q. Did you have any social security on that?

A. Yes sir.

Q. How much?      A. \$9.06.

Q. And compensation and liability insurance?

A. \$29.31.

Q. Did you have any clean-up work on that later?      A. Yes sir.

Q. You gave me \$483.50 as the labor charge?

A. Yes sir.

Q. Did you have a subsequent labor charge in the clean-up work on that?      A. Yes sir.

Q. How much?      A. \$141.15.

Q. Do you remember when that was?

A. I think it was in June, next year, or just prior to it.

Q. What other charges or items of expense did you have and did you have a social security on that item as well?

A. I presume it is included in the other.

(Testimony of J. A. Barnard.)

Q. And what is the next item there on your memorandum?      A. Caterpillar use.

Q. Did you use a caterpillar or a bulldozer on the dam site?      A. Yes sir.

Q. And when would that have been?

A. In the early summer of the next year, same date I mentioned.

Q. Long after Mr. Maehl was gone? [305]

A. Yes sir.

Q. How much for caterpillar?      A. \$80.00.

Q. \$80.00?      A. Yes sir.

Q. What is the next item?

A. Item of tools here of \$10.00.

Q. I think we won't take that for the moment. What else?      A. Labor bond.

Q. What was your labor bond?      A. \$7.66.

Q. \$7.66?      A. Yes sir.

Q. And what was your next item?

A. Supervision \$6.24.

Q. \$6.24?      A. Yes sir.

Q. Now if Mr. Boone's contention is correct,—going back now to the 118 acres, the items which you gave me total \$9322.10. Would that be the sum and total, if his addition is correct, of the amount expended by Barnard and Curtiss for the items which you have enumerated

A. I think we have missed one.

Q. What is that?      A. Team labor.

Q. What did you do, hire some teams,—and how much was that?      A. \$107.43.

(Testimony of J. A. Barnard.)

Q. To the team owner?

A. It hasn't been paid. [306]

Q. Whose teams were that?

A. Mr. Metcalf's.

Q. Barnard and Curtiss owes that amount to Mr. Metcalf? How much?      A. \$107.43.

Q. That totals \$9429.53, and if that total is correct is that the amount expended by Barnard and Curtiss on the 118 acre tract exclusive of your office and your general overhead?

A. I don't think it was all of it, it was all we could dig up.

Q. Now coming back to the item on the dam side, the addition there appears to be \$756.92. Would that be the total amount expended by Barnard and Curtiss for the items on the dam site?

A. Apparently that is approximately it.

Q. The total of those two is \$10,186.45. Is that the total amount then expended on the dam site and the 118 acre tract?

A. I haven't added it up.

Q. If that addition is correct, it is that amount?

A. Yes sir.

Q. You have some reference on that sheet to tools, Mr. Barnard,—did Barnard and Curtiss buy the tools that were used on the clearing on the 118 acre and the dam site tracts?

A. Any that is noted on the sheet here, they did.

Q. And state what,—you have the hardware company's bills there,—see if you can dig them out.

(Testimony of J. A. Barnard.)

Now take the sheet first and tell us how much was expended by Barnard and Curtiss Company for tools furnished for the clearing on the 118-acre [307] tract?           A. \$302.63.

Q. \$302.63? What kind of tools were they?

A. I don't think the \$302.63 insofar as the tools go, that is axes, saws, tools related to clearing work.

Q. Do you have all of the bills?

A. I think I have.

Mr. Toole: Does counsel want to examine the bills?

Mr. Smith: I don't want to examine those bills but I just want to know how he knows whether the bills relate to tools.

Q. I will ask you, Mr. Barnard, if the little yellow slips there are signed by either Maehl or Metcalf?

A. I think for the most part they are. I think there may be some missing.

Q. I will ask you if the total of the bills is larger than \$302.63?           A. Oh yes.

Q. And if you have selected only those tools which were sent up to those two jobs and most of which were purchased on slips signed by Maehl or Metcalf?           A. That is right.

Q. And those amount to \$302.00?

A. Yes sir.

Q. Is that on both the dam site and the 118 acres, so-called?



(Testimony of J. A. Barnard.)

A. Yes, excepting for a \$10.00 charge we made on the dam site which isn't included.

Q. There should be an additional \$10.00 charge . . . Let's add that. That would make \$312.63 for tools? [308]

A. That's right.

Q. Mr. Smith says he thinks you have added that in once?

A. There is a \$10.00 charge for tools that is allocated to the dam site on this statement which isn't in the \$302.00.

Q. It is in one of the other figures which you gave me?      A. Yes.

Q. That will be \$302.63 as it originally was. Now this,—you may have testified to this before but I want to ask you now, do you happen to know when the clearing or grubbing, or about when the clearing and grubbing on the dam site was finished, of your own knowledge?

A. Last of May or first of June, 1936.

Q. And at that time was Mr. Maehl there at all?

A. No.

Q. Did you mean 1937 or 1936, you said 1936.

A. 1936, yes, second year.

Q. Maybe I have that wrong.

The Court: He said it twice, it stands.

Q. Well I would like to ask,—I think the witness is plainly mistaken.

The Court: He states twice under oath that it was 1936.

(Testimony of J. A. Barnard.)

Q. Mr. Barnard, when did you get this contract?      A. 1936.

Q. In 1936. At what time did you get the contract?      A. About August.

Q. August of 1936?      A. Yes sir.

Q. Did you have a contract for the Phillipsburg dam in June of 1936?      A. No sir. [309]

Q. Did you have a contract for the construction of the dam in 1937?      A. Yes sir.

Q. And when was the contract completed?

A. That fall, in December.

Q. Of 1937?      A. Yes sir.

Q. When was Mr. Maehl last up there, do you know?      A. I think in March.

Q. Of what year,—now be careful.

A. 1937.

Mr. Toole: That's all.

#### Recross Examination

By Mr. Smith:

Q. I hope, Mr. Barnard, you have been as correct about all these figures as you were about the time Mr. Maehl was at the dam site. I have here, Mr. Barnard, the payroll sheets numbers 30 to 39 inclusive. I will ask you to look at the tabulations on the back of those sheets and ask you if it doesn't appear on each of them "Re Maehl contract No. 2"?

A. There is that on there, yes.

Q. Do you know without looking whether it appears on the sheets from 30 to 39?

(Testimony of J. A. Barnard.)

A. No, I wouldn't know without looking.

Q. Will you look, please?

Mr. Toole: Counsel ought to introduce the payroll.

The Court: I don't think that it is needed.

A. You want me to look through each and every one?

Q. Yes. [310]

A. (Witness does so)

Q. These payrolls, Mr. Barnard, were prepared under your supervision, were they?

A. Yes sir.

Q. And likewise the recap and summary which appear on the back of them were prepared by some employee of yours?      A. Yes.

Q. What does the designation, Maehl contract No. 2 or Maehl No. 2 clearing, mean as it appears on each of those sheets?

Mr. Toole: I think, your Honor, if you please I want to state in advance I object to the question on the ground that the payroll speaks for itself.

The Court: Overruled.

Mr. Toole: Note an exception.

A. Maehl No. 2 contract has to do with the labor and expense of doing the work on the Maehl 50-acre tract.

Q. In other words do you mean that the contract on the 50-acre tract was Maehl contract No. 2?

A. That was part of it, yes.

(Testimony of J. A. Barnard.)

Q. And can you tell us how the designation Maehl contract No. 2 came to be applied?

A. I think it was when we took an active part up there in the supervision of that.

Q. You mean that when Maehl was proceeding under the written contract, would that be designated as Maehl contract No. 1?

A. The written contract,—I don't have that separated in my mind.

Q. Well now, I am not clear. It seems to me that my [311] recollection of what you just said is that Maehl contract No. 2 refers to the time that you took over the supervision.

A. Yes, that's right.

Q. Would Maehl contract No. 1 refer to the portion of the time on this written contract that Mr. Maehl was doing the work himself?

A. Yes, I think it would.

Q. In other words this definitely signifies,—

A. Yes, that will signify on the books from that time on.

Q. So that Maehl contract No. 1 would be the written contract up until the time you took the job over, is that right?

A. I don't know whether that would correctly describe it or not. It is a separation of the account up until the time we went,—

Q. It is a separation of the account?

A. It is a separation of the account.

(Testimony of J. A. Barnard.)

Q. What is this designation No. 2? It designates the contract after you started work?

A. After we took supervision of it, yes.

Q. Maehl No. 1 would refer to the written contract, now, before you started your supervision?

A. We definitely separated the job at the time we went in and took supervision, yes.

Q. And I will ask you if in any of the other books and papers prepared under your supervision, there is anything with respect to Maehl contract No. 1 which covers the period up until the time you took supervision?

A. I am not clear on that question.

Q. Do you have anything in your books which would show [312] that the written contract up until the time you took supervision as contract No. 1?

A. Well, yes. It is entered on the books as you see it here. That is a book entry.

Q. From the payrolls, beginning from the recapitulation sheet on the payrolls beginning March 14, the term Maehl contract No. 2 appears,—now that apparently was the time you took the contract over was it not, approximately March 14?

A. That's the time this separation on the payroll is made.

Q. So you designate that period as contract No. 2. Now then, do you have anything in your books that shows a similar designation for the first part of the performance under the Maehl contract?

A. I would have to look and see.

(Testimony of J. A. Barnard.)

Q. I won't ask you to look now. Will you look during the next recess?

The Court: Let's take the recess now.

Whereupon at 10:50 a. m. the jury was admonished and court was adjourned until 11:05 a. m. at which time the trial was resumed.

Q. Now if you designate the period from the time that you took the written contract on the 50 acres over as contract No. 2, do you have anything on your books that shows a designation of the time, —of the period from the time that Maehl first started on the performance of the 50 acre contract to the time that you took it over as contract No. 1?

[313]

A. Yes sir.

Q. Will you show me where that is?

A. You want No. 1?

Q. Now what period does contract No. 1 cover and what work being done by Maehl does it contemplate?

A. From this sheet?

Q. Yes.

A. The entries here up to March 31 on this,——

Q. March 31, what year?      A. 1937.

Q. And when do they commence?

A. January.

Q. January, what day?

A. The ledger date is January 31.

Q. So that the period that Maehl was performing the contract as to the 50 acres is from January

(Testimony of J. A. Barnard.)

to March, 1937, as to contract No. 1. Is that right?

A. On the 50 acres, yes.

Q. And the period after you took it over, that is contract No. 2?

A. That is also the 50 acres.

Q. But designated as contract No. 2?

A. Yes sir.

Q. Now, first where are those hardware bills that you had? May I read to the jury to save putting in the record one of the notations appearing on this,—

Mr. Toole: Is that for the period designated as contract No. 2 in the books?

Mr. Smith: —and is from the recapitulation attached to that. I am going to read to the jury from payroll for [314] the period March 14, 1937 to March 20, 1937, and particularly from the distribution of the payroll sheet attached to the back of it. (Reading): “Re Maehl contract No. 2. We are keeping separate account of this contract even though the company has taken over the clearing of Maehl acreage. This is done to find a basis of comparative costs as well as keep the portion allotted to Mr. Maehl under one heading.” These hardware bills are the bills that you used in making up your summary as to those costs, are they?

A. Yes sir.

Q. And in segregating the items which you have charged to the Maehl clearing, did you go through the whole list and take all of the slips signed by

(Testimony of J. A. Barnard.)

Maehl and all of the slips signed by Metcalf and use those items in your totals?

A. I didn't do it myself.

Q. As a matter of fact, Mr. Maehl at one time during the progress of the work on the East Fork, was working on the camp, was he not?

A. Yes sir.

Q. And likewise Mr. Metcalf at one time during the progress on the work, was working on what we might call a Barnard-Curtiss crew, was he not?

A. Yes sir.

Q. Now do you have any way of knowing whether your bookkeepers or whoever segregated these accounts, eliminated from the totals which you gave us, the tools which may have been bought by Maehl or Metcalf while Maehl was working on the camp and while Metcalf was working on the Barnard-Curtiss crew?      A. They no doubt can.

[315]

Q. Now I am asking you if you know whether they did make that segregation?

A. Yes, they were directed to make that.

Q. Do you know whether they did or not?

A. I was sure that they did.

Q. You were sure that they did. Did you check it yourself?      A. To some extent.

Q. From your own checking can you say that the tools Maehl may have bought while on the camp and the tools Metcalf may have signed for on the



(Testimony of J. A. Barnard.)

Barnard-Curtiss clearing were not included in this total? A. Were not included?

Q. Yes, can you say that from your own knowledge? A. To the best of my knowledge.

Q. Can you say that to your own knowledge, do you actually know that that is true?

A. Yes, I checked the accounts myself. Unless I made a mistake they are correct.

Q. In other words, the total that you gave us is a product of your own checking and computation?

A. Yes. I didn't make the entries, but I checked them.

Q. You checked the bills properly allocated to the 118 acre job? A. Yes sir.

Q. In preparing your summary sheet from which you gave us the various figures as to the amounts paid out by Barnard-Curtiss you relied, did you not, on the work of your bookkeeper?

A. Yes sir. [316]

Q. You yourself were not present at the dam construction all of the time?

A. Not all of the time.

Q. What proportion of your time would you say that you were present?

A. Well I was there a great deal, gone a few days at a time and back again. I was there most of the time.

Q. Well, you weren't there from January 18 until some time after March, were you?

A. I was there only once.

Q. And how long did you stay?

(Testimony of J. A. Barnard.)

A. Couple or three days.

Q. And during the progress prior to January 1, you were gone some portion of the time?

A. Yes sir.

Q. In making this summary sheet, you didn't make it yourself, you had some bookkeeper do it?

A. Yes sir.

Q. What bookkeeper?

A. Well, the timekeeper and bookkeeper, Mr. Pollock, Mr. Martin.

Q. And they are not present in Missoula?

A. No sir.

Q. In making the ledger, that's this book, the bookkeeper who made those entries relied upon the distribution of work made by the various timekeepers?      A. Yes sir.

Q. Would the bookkeeper who made the entries have any independent knowledge of his own as to whether the time of any particular man,— [317]

Mr. Toole: That is objected to as calling for a conclusion and asking the witness to testify as to the,—

The Court: Sustained.

Mr. Smith: My purpose in this was that the witness has testified that this was made under his supervision on that basis the books and the summary sheets were introduced. Of course if he had supervision I assumed that he would know how it was prepared.

The Court: That isn't the question. It was whether the bookkeeper knew.

(Testimony of J. A. Barnard.)

Mr. Smith: The original first record that is made of any time would be kept in the time books, would it not?      A. Yes sir.

Q. And anybody taking figures from those time books would have to assume in the first instance that the timekeepers had properly allocated it.

Mr. Toole: Same objection.

The Court: It is overruled.

Mr. Smith: The time to the various jobs.

A. That's the practice, yes.

Q. And that would be true likewise, would it not, to social security, compensation, tools and all of the various things?

A. Yes, the percentage.

Q. That would be likewise true as to the use of equipment, these caterpillars and that sort of thing on various jobs?      A. No.

Q. What would the situation be with respect to that?

A. Well, the superintendent generally handles that.

Q. Who? [318]

A. He would direct the bookkeeper.

Q. Now then, if the ledger book is made up and the bookkeeper starts work on the summary which you have made he takes the entries,—he must necessarily take the entries in the ledger as being correct, must he not?      A. The bookkeeper?

Q. Yes, the bookkeeper who made the summaries.      A. Yes.

(Testimony of J. A. Barnard.)

Q. Now if you will refer to the time sheets involved in the,—what has been designated as Maehl contract No. 1 and run the figures through I think you will find that an error of some \$20. in addition was made. Now we took the items from the contract and added them on an adding machine. I wish you would check,——

Mr. Toole: Now Mr. Barnard the witness has a right of course to take the payrolls and go through them.

Q. If you care to, I will read those to you and you can check the adding machine slips, \$430.20.

Mr. Toole: Show him the first payroll, let him,——

The Witness: I would like to say, the payroll may not be in check with the distribution sheet.

Q. Well where were the figures that appear on this paper taken from?

A. They apparently were taken from the ledger and that would show that they were off of the distribution sheet.

Q. In other words, there may be a discrepancy in the amounts appearing on the payroll and the distribution sheets.

A. Yes, there might be.

Q. And these, this summary represents the work taken [319] from the distribution sheets?

A. Yes sir.

Q. Well let's go through this now, you go through it, Mr. Toole doesn't want me to have anything to do with this.

(Testimony of J. A. Barnard.)

A. The tape apparently checks with the distribution.

Q. I will ask you to compare the total figure with the figure on your summary sheet.

A. Which one is that?

Q. Well the same sheet.

A. It is \$4301.30 and this is \$4281.30.

Q. Difference of \$20.00?           A. Apparently.

Q. Now, I show you one of the hardware slips from which you made your summary as to tools, the first yellow sheet there, and at the bottom of that I see an item marked charge Maehl. Do you know whose handwriting that is?

A. No, I don't know.

Q. Those records have been in your possession ever since they first came?           A. Yes sir.

Q. Do you know the handwriting of your various bookkeepers and superintendents?

A. I don't recognize that signature and I generally do recognize their handwriting, yes.

Q. The bill itself is in carbon, is it not?

A. Yes sir.

Q. And the words "charge Maehl" as they appear thereon are in pencil?           A. Yes sir. [320]

Q. The date that that bears is September 1, 1936?           A. Yes sir.

Mr. Smith: Will you mark that please?

Juror: When did you say that date was, the date there that you just mentioned, what date?

The Witness: On the slip, September 1.

(Testimony of J. A. Barnard.)

Juror: September 1, pardon me, I thought you said December 1.

Mr. Smith: We offer in evidence plaintiff's exhibit No. 14.

Mr. Toole: May I see the exhibit?

Mr. Smith: Just that one sheet.

Mr. Toole: May I see your other exhibits, Mr. Smith. Can you tell here that sheet bears the signature of Ernest Maehl?

The Witness: Looks like it.

Mr. Toole: We have no objection.

Whereupon was received in evidence without objection and read to the jury the instrument referred to, marked as Plaintiff's Exhibit 14, and being as follows:

PLAINTIFF'S EXHIBIT 14

Phone 13

Phone 13

Philipsburg Hardware Co.

Shelf and Heavy Hardware

Mine Supplies      Sporting Goods

Philipsburg, Mont., Sept. 1, 1936.

M	Barnard & Curtiss	Dam Site	
	3 Plumb axes		8.10
	1 Vulcan axe		3.00
	1 Saw Handle		.40
	2 hammer handles		1.10
			<hr/>
			12.60

ERNEST MAEHL

13 Chg. Maehl [321]

(Testimony of J. A. Barnard.)

The Court: Which sheet do you refer to?

Mr. Smith: Which signature are you talking about?

Mr. Toole: Talking about this right down here.

Mr. Smith: Ernest Maehl?

Mr. Toole: Ernest Maehl.

Mr. Smith: When you say this sheet bears the signature of Ernest Maehl, you are referring to the carbon and not to the pencil?

A. That is right.

Q. We offer,—this has been offered without objection.

The Court: If there are no objections, read it to the jury.

Mr. Smith: I will give you this, gentlemen. The only part of it introduced is the yellow slip bearing the number,—

Mr. Toole: Well, let's take it off.

Mr. Smith: That's fine. There are a lot of statements there. I show you another slip from the Philipsburg Hardware Company.

A. Yes sir.

Q. That is likewise one of the slips from which you took your summary?      A. That is right.

Q. And it likewise is in carbon?

A. Same thing.

Q. And likewise the notation charge Maehl appears in pencil?      A. Same thing.

Q. And it bears date 9-11-36?

A. September 11, yes. [322]

(Testimony of J. A. Barnard.)

Mr. Smith: We offer in evidence,—

Mr. Toole: Let me see it, please. Are you able to identify that as Mr. Maehl's signature on that?

A. Yes, it is the same signature as on the other one.

Mr. Smith: And again, the handwriting,—when you say it is Maehl's signature you are referring to the carbon. And the pencil "chaerge Maehl" does that appear to be the same as the other?

A. Appears to be the same, yes.

Mr. Smith: We offer in evidence plaintiff's exhibit 15. It is much the same as the other one.

Mr. Toole: No objection.

Whereupon without objection was received in evidence the instrument which is identified as and marked Plaintiff's Exhibit 15, and the same being as follows:

PLAINTIFF'S EXHIBIT 15

Phone 13

Phone 13

Philipsburg Hardware Co.

Shelf and Heavy  
Hardware

Mine Supplies  
Sporting Goods

Philipsburg, Mont, 9-11-1936

Mr Barnard Curtiss Co

400 " fuse	4.00
200 Caps	4.00
15—2 Cloth	50

Dam Job

E. MAEHL

Chg Maehl



(Testimony of J. A. Barnard.)

Mr. Smith: I will show you plaintiff's proposed exhibit 16. It appears to be the same sort of slip from the same source. The signature of Mr. Maehl appears to be the same and the handwriting charge Maehl is the same. This date appears to be 9—

A. Yes sir.

Mr. Smith: We offer in evidence plaintiff's exhibit No. 16.

Mr. Toole: No objection.

The Court: It will be admitted and considered read into the record.

Whereupon without objection was admitted in evidence, considered as read, the instrument referred to, identified as and marked Plaintiff's Exhibit 16, and being as follows:

PLAINTIFF'S EXHIBIT 16

Phone 13

Phone 13

Philipsburg Hardware Co.

Shelf and Heavy  
Hardware

Mine Supplies  
Sporting Goods

Philipsburg, Mont. 9-2 1936

M Barnard Curtiss Co

200 # 2090 Powdr	1.75
300 Cap	6.00
400 " fuse	4.00

7.50

Dam Sight

ERNEST MAEHL

(Testimony of J. A. Barnard.)

Mr. Smith: I think we have nothing further.

Redirect Examination

By Mr. Toole:

Q. Did Mr. Maehl ever pay Barnard and Curtiss Company for the items on those slips?

A. As far as I know, not.

Q. Did Barnard-Curtiss pay Philipsburg Hardware for them? A. Yes sir.

Q. And are those the same items as are charged back against Mr. Maehl on his 50 acre contract?

A. 50 acre contract?

Q. Or dam site, I should say.

A. Yes sir.

Mr. Toole: That's all,—wait a minute. I will ask you with respect to these contracts 1 and 2, do you know how they happen to be designated as contracts 1 and 2, Mr. Barnard? A. Yes.

Q. I will just hand you that. That was read to the jury, that paragraph down there.

A. At the time that this notation was made,—

Q. And when would that have been?

A. Between March 4 and 20, evidently on March 20. It was in order that,—we were keeping a separate account of this contract even though the company had taken it over. It was done to find a basis of comparative cost, so as to keep the portion allotted under one heading at that time. The balance of the work done after that date was noted as contract No. 2.

(Testimony of J. A. Barnard.)

Q. Was that the work that was carried on by Barnard- [325] Curtiss in completion of the 50 acre tract? A. That is right.

Q. And how, if you know, that contract No. 1 was entered then in the ledger?

A. Well in order to keep them apart and be able to recognize them I think the bookkeeper numbered the earlier one No. 1.

Q. Take the ledger, Mr. Barnard. There appears to be a ledger account, contract No. 1. It says here Maehl clearing contract No. 1. A. Yes.

Q. The entries on that,—in that are between January 31, did you say,—

A. Well, the ledger entry would be made at the end of the month and that would be January 31.

Q. To what time? A. March 31.

Q. And was that while Maehl was himself up there clearing the 50-acre tract? A. Yes sir.

Q. On a separate page some place there is Maehl No. 2. Why would those pages be separated. Do you know why?

A. To be able to tell what the costs were between those times.

Q. Well, more specifically now, why was it done?

A. Well, it is explained on the payroll sheet.

Q. I want to ask this witness a leading question, if I may.

The Court: He says it is explained on the recapitulation. I will request that he read the explanation.

(Testimony of J. A. Barnard.)

The Witness: (Reading) We are keeping separate ac- [326] count of this contract even though the company has taken over the clearing of Maehl acreage. This is done to find a basis of comparative costs as well as keep the portion allotted to Mr. Maehl under one heading.

Mr. Toole: That reference then, is to the last half of the Maehl 50-acre contract?

A. Yes sir.

Mr. Toole: I think that's all. You did find \$20.00 difference in your addition there, did you?

A. As far as we went we did.

Q. You didn't go through all of the other payrolls to see if some item may have been put in there in some other payroll?

A. I didn't discover any difference on the tape so far.

Mr. Toole: I think that is all.

Mr. Smith: Just a moment please, I have one question which I should perhaps have asked on cross examination.

#### Recross Examination

By Mr. Russell Smith:

Q. This summary sheet from which you have testified, Mr. Barnard, was prepared when?

A. It was prepared about the time we finished the job,—you mean this?

Q. That particular sheet. A. Yes.

Q. That is the only sheet you have, is it not,

(Testimony of J. A. Barnard.)

showing any comprehensive set-up of the costs on the Maehl contract?

A. Well, we have had,—we have done a lot of work on it and this is the sheet that we have finally adopted as being correct. [327]

Q. What I am getting at,—

A. We may have a copy of this in addition to this sheet.

Q. Well this sheet, or copy of this sheet,—that is the only place where this information all appears in one comprehensive way?      A. I think it is.

Q. And that wasn't done until sometime in June, would it be?

A. Completed probably after that.

Q. After that? You said at about the time of the completion of the job.      A. November.

Q. So that that was made in November?

A. I couldn't say November, between completion and November.

Q. Now was that made after the institution of this law suit?

A. I have forgotten when the law suit was first instituted.

The Court: April 14, 1938.

Q. Do you know whether it was made for the purpose of the lawsuit?

A. I couldn't answer that question. No, I don't know.

Mr. Smith: I think that's all.

(Testimony of J. A. Barnard.)

Redirect Examination

By Mr. Toole:

Q. Mr. Barnard, was it made after any demand had been made on you by either Maehl or Metcalf?

A. I think it was.

Q. Why did you make that? [328]

A. Well, we made it to find out where the accounts stood.

Q. What accounts?

A. The accounts of Maehl.

Q. And did Metcalf,—had Metcalf made any demand on you at the time? A. Yes he had.

Q. And that includes the area for which Metcalf claimed a contract also? A. Yes.

Mr. Toole: I think that's all.

Recross Examination

By Mr. Smith:

Q. You didn't up until the time that was made actually know where you stood? A. Yes.

Redirect Examination

By Mr. Toole:

Q. Did you know where Maehl stood on the 50 acre contract? A. On the 50 acres?

Q. When did you find that out?

A. On the completed job?

Q. No, at the time when Maehl left and when you went in and finished.

A. We knew where he stood.

(Testimony of J. A. Barnard.)

Q. Where did he stand?

A. Approximately \$2500.00 in the red.

Recross Examination

By Mr. Smith:

Q. Did you have that information all in any one comprehensive place?           A. Yes sir.

Q. Where does that appear in your books?

A. On this book.

Q. I thought you said you knew where Maehl stood on the 50 acres before you made this computation.           A. We did.

Q. Do you have a book,——

A. The records would show that.

Q. Does it show at all in one place?

A. On the ledger?

Q. Yes.           A. I think it does.

Q. Well let's see that. I thought the purpose of this summary was because everything was scattered, all the information that appears on this doesn't appear in any one place on the ledger and you had to pick out some here, there and the other place and put it on here before you knew.           A. Yes.

Q. Take your ledger sheet and Maehl contract 1, what does it show as to the expenditures charged against Maehl up until the time,——

A. The ledger shows \$4387.62.

(Testimony of J. A. Barnard.)

Redirect Examination

By Mr. Toole:

Q. And at that time,—it is alleged by the complaint,—do you recall how many acres he had cleared?

A. I think it was 24.

Q. At \$100.00 an acre? [330]

A. Yes sir.

Q. And he had partially cleared, I think you said, some other amount,—some 12 acres.

A. Yes.

Q. And what total value was put on that?

A. On the 12 acres?

Q. On the 24 fully cleared plus the 12 partially cleared,—you have it on your yellow sheet if you will just look at it there.

A. \$2700.33 was the value put on it.

Q. So that when you said he was about \$2500.00 in the hole, what figures did you refer to?

A. Difference between that and the expenditures.

Q. And if you just take a pencil here and take the \$2700.33 from the amount shown on the ledger,—and tell us how much it does amount to.

A. \$1687.29.

Q. And is that substantially the information you had when you made the memorandum?

A. Yes sir.

Mr. Toole: I believe that's all.



(Testimony of J. A. Barnard.)

Recross Examination

By Mr. Smith:

Q. When was the ledger,—what date does that ledger sheet bear?           A. This No. 2?

Q. Yes.           A. The last date?

Q. Yes.           A. March 31. [331]

Q. The totals here were the totals as of March 31?           A. I presume so.

Q. And would they be compiled about that time?

A. I presume so.

Mr. Toole: When you said compiled, did you mean the ledger?

The Witness: Yes.

Mr. Toole: Yes. That's all.

Witness Excused.

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The Court: Is this witness finally excused? Now does the plaintiff wish further access to the books and records?

Mr. Smith: No, your Honor.

The Court: Well, they will be kept here in Mis-soula until the termination of the trial and if you wish to make a further examination of them the Court will authorize you to do so. Call the next witness.

Mr. Toole: That's all for the defense, your Honor.

Defendant Rests.

The Court: Any rebuttal?

Mr. Smith: Yes; we will call Mr. Maehl.

And thereupon the following evidence was introduced by the plaintiff in rebuttal:

ERNEST MAEHL,

the plaintiff, was called in rebuttal and testified as follows: [332]

Direct Examination

By Mr. Russell Smith:

Q. Will you tell the court and jury, Mr. Maehl, the nature of the work done on the 50 acre tract at the time you ceased working there?

A. We had 24 acres cleared completely and that 12 acres,—kind of guessing at it,—and quite a lot of timber down on that when we quit work.

Q. And with respect to the 24 acres cleared, was there any timber down criss-cross in that area?

A. Not on the 24 acres.

Q. What did you say as to the amount of burning which had been done on the 24 acres?

A. They had it perfectly clean, everything that we could find.

Q. Now, in the clearing work, do your clearers work in different crews?

A. Most of the time in three.

Q. And tell us just how those crews are separated and what they do.

A. They generally have a bunch cut everything they can chop with axes go ahead and clear the

(Testimony of Ernest Maehl.)

underbrush and then a crew come cut the logs, and a crew burning in back.

Q. With respect to the 12 acres, what was the condition of that?

A. Was in good condition. Underbrush was practically all cut on the 12 acres and partly more.

Q. And how was the snow condition up there at that time?

A. Wasn't any snow after we felled the timber, was little in the standing timber. [333]

Q. What was the snow condition on March 14 and 15 as compared with the snow condition the earlier part of that winter?

A. Snow was practically gone on the 15th of March.

Q. Now, with respect to the,—having in mind the 24 acres cleared and the 26 acres which had not been completely cleared, can you tell us what the nature of the timber generally was on those two tracts?

A. Well, the timber was getting some lighter and smaller as we got up toward the upper end of the reservoir, had all big timber, 3, 3½ feet through.

Q. Is it more difficult to clear land with the heavy timber than the light?

A. Quite a difference.

Q. Which is more expensive?

A. Heavy timber.

Q. Now, what effect did the weather conditions

(Testimony of Ernest Maehl.)

existing from January 18 until March 14 or 15 have upon your clearing?

A. Well, during January and the biggest part of February it was awful cold and stormy quite a bit.

Q. And what about the trees themselves?

A. Well, they are naturally frozen and harder to burn than after they thaw out.

Q. What was the weather condition in March with respect to the timber?

A. Practically about the same as it is now. Nice, sunshiny weather.

Q. What was the condition of the trees as to being frozen? [334]

A. Wasn't frozen any more.

Q. Now referring, Mr. Maehl, to the tract known as the dam site, what was the condition of the dam site at the time that you finished.

Mr. Toole: Objected to as improper rebuttal. He has already testified to that on the direct examination. He stated that it was completely finished.

The Court: Well let him tell it again. It may be repetitious.

A. It was all cleared and grubbed except I think there was three little piles of stumps I think we didn't burn because it was close to some timber that had been cut,—too much danger running into the stand.

(Testimony of Ernest Maehl.)

Mr. Toole: Move the answer be stricken as not consistent with the,—

The Court: It will be stricken.

Mr. Toole: —not consistent with the original statement of the plaintiff as to the contract that he had and it is inconsistent with the pleadings.

The Court: It appears to me the matter was definitely covered on your direct case. The rebuttal must be based upon something that developed during the case of the defendant.

Mr. Smith: Was the dam site cleared, Mr. Maehl, as to the sides of the,—up on the hillside which was involved in the dam site?

The Witness: Yes.

Mr. Toole: Same objection. Move that the answer be stricken.

The Court: The objection will be sustained. [335] This was all gone into on the plaintiff's direct case. The defendat apparently has tried to prove its counter-claim based on the written contract for the 50 acre clearing. Now we are going back to the dam site which is included in the first cause of action set out in the complaint.

Mr. Smith: We will abandon this portion of the examination.

Q. During the course of your clearing on the 118 acres, Mr. Maehl, what if anything do you have to say with respect to whether the men employed by you were at all times engaged in dam site or in reservoir site clearing?

(Testimony of Ernest Maehl.)

Mr. Toole: Objected to for the reason that it assumes a state of facts that is not in the record. It is improper rebuttal.

Mr. Smith: Well I may say that my purpose is this, your Honor,—

Mr. Toole: Now if you please, your Honor, I don't want counsel to state any purpose unless the jury is dismissed.

Whereupon the jury was dismissed from the court room.

Mr. Smith: My purpose in this line of examination, your Honor, is this; the defendant has put in evidence certain amounts which Barnard-Curtiss claim to have paid on account of clearing on the 118 tract. We think they were improperly admitted but for the purpose,—we think that under the theory that they are admitted we think they are not competent evidence of payment, but the purpose of this examination is to show that those records at the time Mr. Maehl was there from time to time Barnard- [336] Curtiss came and borrowed men from him for a day, half a day or so, and so far as Mr. Maehl's knowledge is concerned there was never any credit given him on the books for any of the borrowed time.

The Court: The defendant denied the contract, as well as any payment on it, but if plaintiff produces testimony on a contract that doesn't exist, it seems to me defendant may prove what was done

(Testimony of Ernest Maehl.)

under it although that evidence was admitted merely for the purpose of crediting the witness.

Mr. Smith: Well with that understanding we withdraw the question.

The Court: The jury will have to solve that, not me. With the evidence before it the jury must determine whether the defendant contends all the payments were made on the 50 acre contract or whether there were some payments made on another contract included in the operation. Call in the jury. Will there be any further witnesses?

Mr. Smith: I had intended to call in some more witnesses along this line but in view of the situation,—

Thereupon the jurors resumed their seats in the jury box.

The Court: Do you wish to cross examine?

Mr. Smith: I want to go further with this witness.

The Court: Very well.

Q. Now, Mr. Maehl, referring to the time that you ceased to work on the 50 acre tract, the time when the 24 acres had been cleared and the 12 acres had been partially cleared, will you tell us the circumstances under which you ceased [337] to work on the job?

Mr. Toole: That is objected to as calling for parol evidence to alter the terms of a written contract,——

(Testimony of Ernest Maehl.)

The Court: Well, it may be altered by an oral executed agreement under the statutes so the objection will be overruled.

Mr. Toole: I want to make the further objection that that is not in issue in the pleadings—

Mr. Smith: What isn't?

The Court: Well the objection will be overruled.

Mr. Smith: Will you read the question, please?

Q. (read by reporter) Now, Mr. Maehl, referring to the time that you ceased to work on the 50 acre tract, the time when the 24 acres had been cleared and the 12 acres had been partially cleared, will you tell us the circumstances under which you ceased to work on the job?

A. Mr. Strickland come over to me one day, said that—

Mr. Toole: Object to any statement made by Mr. Strickland as not having been—

The Court: Well, it does appear that he was a superintendent.

Mr. Toole: —the further objection that he hadn't any authority to make or alter any contract.

The Court: Objection will be overruled.

Mr. Smith: Do you have in mind the substance of the question, Mr. Maehl?

The Court: Read the question again.

Q. (read by reporter) Now, Mr. Maehl, referring to the time that you ceased to work on the 50 acre tract, the time when the 24 acres had been cleared and the 12 acres [338] had been partially



(Testimony of Ernest Maehl.)

cleared, will you tell us the circumstances under which you ceased to work on the job?

A. Mr. Strickland come over to where I was working and he says "we are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should have been done." I asked him what he meant. He explained it to me that he had a lot of fellows that were supposed to be truck drivers and Caterpillar drivers that he wanted to keep, he says we would like to take this over now and finish the clearing with these men on account they wanted to hold them for other work. He says "you ain't making any money over wages anyway". I says "that's right", and he says he had more important work for me to do,—

Mr. Toole: Will you excuse me, Mr. Maehl. I move that the entire answer,—

The Court: Let the witness **finish**.

A. (continued) He said he would like,—that they had other work they didn't have anybody to qualify for it and wanted me to do it and I says "all right, if you pay us for the tools or return the tools to me and you can take the job over in the morning", which he did. That is all that was said at the time.

Mr. Toole: Now, I move that the answer be stricken as not responsive to the question; as a statement by a person who is not shown to have any authority to contract for Barnard-Curtiss Com-

(Testimony of Ernest Maehl.)

pany; upon the further ground that it is a statement which definitely alters a written contract by parol evidence; and upon the further ground that [339] if such a statement was made and if a mutual agreement was made to cancel the contract there was no consideration shown for it and for the further reason that it is not within the issues of the pleading.

The Court: The motion will be denied.

Mr. Toole: Note an exception, please.

Whereupon, at 12:00 o'clock noon, Tuesday, October 17, 1939, the jury was duly admonished and court was adjourned until Monday morning, October 23, 1939, at 10:00 o'clock a. m., at which time the trial was resumed. [340]

The Court: Ernest Maehl versus Barnard-Curtiss Company, is there any further proof?

Mr. Smith: We have, perhaps, just a few minutes more on our rebuttal.

The Court: And the defendant?

Mr. Toole: I think that ours will be very short; perhaps three questions to each of three witnesses only, on sur rebuttal.

The Court: And how long do you wish on the argument?

Mr. Smith: I would judge about oh 45 minutes; I haven't talked with Mr. Toole about it yet.

Mr. Toole: Well that seems sufficient to me.

The Court: 1714, Ernest Maehl versus Barnard-Curtiss Company. Proceed.

ERNEST MAEHL,

the plaintiff, resumed the witness stand, in rebuttal, and upon direct examination, continued, by Mr. Russell Smith, testified as follows:

Direct Examination

(continued)

By Mr. Smith:

Q. You are the same Ernest Maehl who was testifying at the recess we had last Tuesday?

A. Yes sir.

Q. At that time, Mr. Maehl, you testified, if you recall, relative to a conversation that you had with Mr. Strickland at about the time that you ceased to do any work on the site, do you recall that?

A. I do.

Q. Now with reference to that conversation, Mr. Maehl, was anything further said at that time between you and Mr. Strick- [341] land which you did not tell us about last Tuesday?

A. He said that—

Mr. Toole: —wait just a minute; before the conversation is given I want to add an objection to that which was made, in that the conversation referred to would be incompetent—in addition to the objections which were made. Your Honor will recall that last Tuesday they offered oral evidence to vary the terms of a written contract; I want to make this further objection that the conversation now referred to is a conversation which appears to

(Testimony of Ernest Maehl.)

have taken place subsequent to the date provided in the written contract for the completion, and that that would not be competent, the contract already having been breached or abandoned at the time that conversation took place.

The Court: The objection will be overruled.

Mr. Toole: Exception.

The Court: It will be noted.

Q. (read by reporter) Now with reference to that conversation, Mr. Maehl, was anything further said at that time between you and Mr. Strickland which you did not tell us about last Tuesday?

A. He said that the contract was—that we would call it square if I would handle that part of the clearing that was left so as to make a kind of a line—straighten up a kind of a line—it would terminate the contract.

Q. When you say straighten up the line, what do you mean by that?

A. Oh some burning of logs and stuff.

Q. Now approximately what date, if you remember, did this conversation take place? [342]

A. I think it was the 12 of March, either the 11 or 12.

Q. And when did you leave the job?

A. The 15 I think.

Q. Now Mr. Maehl with reference to the 20 acres of grubbing in what has been referred to as the borrow pit will you tell us at what time you commenced the work on that borrow pit?

(Testimony of Ernest Maehl.)

Mr. Toole: Objected to as improper rebuttal.

The Court: You may reopen your case in chief if you wish; otherwise the objection will be sustained.

Mr. Smith: Well I ask to reopen and ask this one question.

The Court: Very well.

Mr. Smith: Will you answer that question now please.

Mr. Toole: What is the question?

Mr. Smith: The question is with reference to the 20 acres in the borrow pit; at what time did you commence that work?

A. Some time around about the 20 of September.

Q. I want you to look at exhibits 16, 15 and 14, the plaintiff's exhibits, and tell me what items are made on those—I can't read them, maybe you are familiar with the items?

A. One item is 3 plumb axes; one saw handle; 2 hammer handles; and then they got this 1 jacking wrench, I guess it is, on here—I took out for Barnard-Curtiss's benefit.

Q. Now just tell us what the items are?

A. 3 plumb axes; a jacking wrench; and 2 saw handles; and 2 hammer handles; 400 feet of fuse; 200 caps, basting caps—I can't make the other item out myself, this last one I can't make out—and 400 feet of fuse and 300 caps—I [343] can't make out the other item.

Mr. Smith: I think that's all.

(Testimony of Ernest Maehl.)

Cross Examination

By Mr. Toole:

Q. Mr. Maehl when you went to Philipsburg, as I understand, you went in the store and purchased those items, did you?      A. Yes sir.

Q. Charged them to Barnard-Curtiss Company?

A. Yes sir.

Q. And you never paid for them did you?

A. Not for these no.

Q. And when you signed the slip you signed your name to the slip?      A. We had to do that.

Q. Directed the store to charge them to Barnard-Curtiss Company?      A. Yes.

Q. You say you can't identify the date from the slip?

A. There is one here, that 11th month—6; and September 1 is one.

Q. What is the first one, November 6, did you say?

A. No this is September I think, it is September 16 or 11, I can't make it out—whatever it is.

Q. Well does it appear to you to be in September, the 16th, about?

A. This one is September 1.

Q. Now 1936, it would be?      A. Yes sir.

Q. At that time you were on the dam site were you not, working on the dam site? [344]

A. Yes sir.

Q. And what is the date of the next one?

A. I can't make it out.

(Testimony of Ernest Maehl.)

Q. Which one is the one——

A. —this is the one.

Q. Exhibit 14, yes; now the next one is—tell us if it doesn't appear to be September 11 or 16—9?

A. It looks like a 16 to me but I ain't sure.

Q. Yes, it looks like the month of September—9?

A. 9 should be the month of September.

The Court: Well the paper is in evidence; the jury will decide that question.

Q. Was that taken out at the time you were working at the dam site?

A. No I was working at the camp.

Q. And now Exhibit 16, where were you working at the time that was purchased?

A. I can't make out that date—the 16th or the 21st.

Q. Well can't you tell us where you were working at that time?

A. Well I was working between the dam site and the building the camp.

Q. So that on those three exhibits, the time the purchases were made, you were engaged either upon the dam site and on the camp is that so?

A. Well not any more at that time we was on the clearing but we wasn't on the dam site no more.

Q. You were being paid then for working at the camp were you not?

A. Part of the time.

Mr. Toole: I think that's all. [345]

Mr. Smith: That's all.

Witness Excused.

Mr. Smith: The plaintiff rests.

And thereupon, the plaintiff having rested his case on rebuttal, the following evidence was introduced by the defendant in surrebuttal:

J. A. BARNARD

was called as a witness in sur rebuttal and testified as follows:

Direct Examination

By Mr. Toole:

Q. Mr. Barnard have you looked at Plaintiff's Exhibit 14, 15 and 16, which were just testified to hear? A. Yes.

Q. Well do you now have in your hand the same summary or computation from which you testified with respect to the expenditures of Barnard-Curtiss Company on this work? A. Yes I have.

Q. Now with reference to the charges on Exhibits 14, 15 and 16, state against what items the charge was made, so far as Barnard-Curtiss' books were concerned?

Mr. Smith: I object to this as improper rebuttal.  
The Court: Overruled.

A. Exhibits 14, 15 and 16, I take it, are these charges?

Q. That's right.

A. And you want to identify them against the charges made on this sheet?

Q. Yes that's right?

A. There is a note against an item of purchases, of \$362.63, notation was made and has been on the



(Testimony of J. A. Barnard.)

sheet right along, [346] stating \$131.36 of this belongs to clearing and grubbing on the dam site.

Q. And state whether or not the three items—the three exhibits—are a part of that \$131.00?

A. These three are a part of that, yes.

Mr. Toole: Now I think that's all.

There was no cross examination of the witness and the

Witness Excused.

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### R. W. BARNARD

was called as a witness in sur rebuttal and testified as follows:

#### Direct Examination

By Mr. Toole:

Q. I am handing you the Defendant's Exhibit 10, which is a bill submitted by Ernest Maehl to Barnard-Curtiss Company; did you at the time or at about the time that that bill was submitted to you say to Mr. Maehl words to this effect: "We haven't got our final estimate yet so we can't discuss clearing with you," or words to that effect?

Mr. Smith: Objected to as improper sur rebuttal. The exhibit, your Honor, was introduced at the time of the examination of Mr. Maehl; he was ques-

(Testimony of R. W. Barnard.)

tioned as to this conversation in our re-examination of him on our case in chief, and in defendant's case in chief nothing was said about it. We therefore object to it as incompetent.

The Court: Well you might consider it a part of the redirect. Overruled.

Q. Did you make such a statement or a similar statement?      A. No. [347]

### Cross Examination

By Mr. Russell Smith:

Q. Did you have any conversation with Mr. Maehl at or about the time that that bill was presented?

A. Well how close to the time, do you mean the time he handed it to me?

Q. Yes.      A. No not at that time.

Q. Where were you at that time?

A. Well I was down at the Courtenay Hotel, over in the hotel.

Q. And at Philipsburg?      A. Yes.

Q. And had you seen Mr. Maehl prior to the time you received this bill?

A. Yes I saw him around there several times.

Q. Did you have any conversation with him immediately, within a day or so preceding that?

A. Yes.

Q. And was this matter mentioned in those conversations?      A. You mean what matter?

(Testimony of R. W. Barnard.)

Q. The matter—was anything said in those conversations about a bill or about the claim that Mr. Maehl had against you, or anything of that sort?

A. Well he handed me this bill.

Q. And that was all that was said?

A. At that time yes.

Witness Excused. [348]

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### OSCAR STRICKLAND

was called as a witness in sur rebuttal and testified as follows:

#### Direct Examination

By Mr. Toole:

Q. Mr. Strickland did you on or about the 12 day of March, 1937, at the site of the 50-acre written contract for clearing, say to Mr. Maehl words to this effect—did you say to him about the middle of March, 1937, with respect to the 50-acre contract, words to this effect: “We are getting too big a crew, a lot of men too many, and we want to make a change, and you get off the ground,” or words to that effect, did you?      A. No.

Mr. Toole: That’s all.

And there being no cross examination of the witness the

Witness was Excused.

And thereupon counsel for defendant announced the defendant rests its case on sur rebuttal.

Mr. Smith: May it please the court I have one more question I forgot to ask Mr. Maehl.

Mr. Toole: Sure.

The Court: Very well, recall him.

Thereupon the plaintiff,

ERNEST MAEHL,

was recalled for further rebuttal testimony, and testified as follows:

#### Redirect Examination

By Mr. Smith:

Q. Mr. Maehl will you tell us whether or not Barnard-Curtiss Company ever made any claim to you on account of the written [349] contract to clear—the 50-acre contract? A. No sir.

Q. When was the first time you had been advised that they had any claim against you in that respect?

A. When I saw the answer to my suit.

#### Recross Examination

By Mr. Toole:

Q. That is, Mr. Maehl, that Barnard-Curtiss Company didn't ask you to pay them anything, did they? A. To pay them anything?

Q. Until you sued them? A. No.

Q. Then when you sued them they counter claimed against you on the 50-acre contract, is that right? A. Yes sir.

Witness Excused.

The Court: Any further testimony?

Mr. Smith: We have no further testimony.

Mr. Toole: I guess that's all.

The Court: Anything further?

Mr. Smith: Not for the plaintiff.

And thereupon the the testimony was closed.

The Court: Very well, open for the plaintiff; 45 minutes on a side, since it is your choice.

Mr. Toole: I wasn't aware counsel was going to argue so quickly; I want to make a motion before proceeding with the case; it will be rather a long motion.

The Court: And how long will it take?

Mr. Toole: About 10 minutes or 15, I couldn't say exactly. [350]

And thereupon, with the usual admonition by the court, the jury was excused from the court room and withdrew.

Mr. Toole: Now comes the defendant, Barnard-Curtiss Company, and moves the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff, on the plaintiff's first cause of action, upon the grounds and for the reasons that the plaintiff has failed to prove that he ever made any contract, either 118 acres or less, for clearing, as alleged in the complaint, or in any other manner. For the further reason that if any such contract was made the plaintiff's own proof is that it was originally made with Maehl and Metcalf, and that for that reason there is a fatal variance be-

tween the pleadings and the proof; upon the further reason that even if such contract was made, and even if no such variance did exist, the plaintiff has failed to prove by any evidence that such contract was executed and carried out by him.

Now as to the second cause of action the defendant moves the court to direct the jury to return a verdict for the defendant and against the plaintiff upon the grounds and for the reasons that the plaintiff has failed to prove that he made any contract with the defendant for clearing and grubbing, or grubbing, the 20 acres, and for the further reason that even if such contract was made there is a fatal variance between the proof and the pleadings, and for the further reason that there is no evidence whatsoever to prove that the plaintiff carried out and executed such contract, if the same ever was made.

Defendant further moves the court to direct a verdict of the jury, to return a verdict for the defendant and against [351] the plaintiff on the sixth cause of action, that being the cause of action wherein the plaintiff alleges that he earned \$1.20 an hour and was paid only 85 cents an hour, upon the grounds and for the reasons that there is no proof whatsoever to sustain any claim under that cause of action, plaintiff's own proof being that he was out there as a foreman and that he accepted 85 cents per hour, and was on the pay roll during all of that time, and the record being clear that he was

so classified by the National Re-employment Service, which, under the contract in evidence, was the agency which designates the salary to be paid on that contract.

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And thereupon the matter was argued by respective counsel.

The Court: Defendant's motion for a directed verdict in his favor on count 1; defendant's motion for a directed verdict in his favor on count 2; and defendant's motion for a directed verdict in his favor on count 6, of the complaint, are each and all denied.

Mr. Toole: Note an exception.

The Court: The exception is noted.

Mr. Toole: Now comes the defendant and moves the court to direct a verdict, a general verdict, for the defendant and against the plaintiff, in the amount of \$3320.09, on the ground and for the reason that the proof shows conclusively that even if all of the contracts pleaded in the complaint were made, and even if all of the services pleaded were rendered, the plaintiff owes an unpaid balance to the defendant on a general verdict—a general accounting between [352] them—in the amount of \$3320.09.

The Court: The motion will be denied.

Mr. Toole: Note an exception.

The Court: Exception will be noted.

Mr. Smith: We now move the court, if your Honor please, to direct a verdict for the plaintiff on

the counter claim now contained in defendant's answer, on the ground and for the reason that the contract itself limits any money which Barnard-Curtiss might have a right to receive from Maehl, to moneys which may become due him, and there is nothing in the contract which authorizes the defendant to charge the plaintiff with any surplus over the money which may become due to him.

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And thereupon the matter was argued by respective counsel.

The Court: The motion will be denied. And the court will stand in recess for five minutes; keep the jury out until 10:50.

Whereupon a brief recess was had at the expiration of which the jurors resumed their seats in the jury box and the trial was resumed.

The Court: Proceed with the argument.

Thereupon, after argument by respective counsel, the court proceeded to instruct the jury orally, in words and figures as follows:

[Omitted per designation of appellant] [353]

Thereafter, on October 23, 1939, verdict was duly filed herein, being in the words and figures following, to-wit: [383]



[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled to try the issues in the above entitled cause find a verdict in favor of the plaintiff, Ernest Maehl in the sum of \$3,368.91.

F. C. CUMMINGS

Foreman

[Endorsed]: Filed Oct. 23, 1939. [384]

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Thereafter, on October 23, 1939, the Defendant's Objection and Exception to the Form of the Verdict, was duly entered herein, the minute entry thereof being as follows, to-wit: [385]

[Title of District Court and Cause.]

Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Ernest Maehl was recalled as a witness in rebuttal, whereupon plaintiff rested.

Thereupon J. A. Barnard, Robert W. Barnard and Oscar Strickland were recalled as witnesses in sur-rebuttal, whereupon defendant rested.

Thereupon Ernest Maehl was again recalled by plaintiff for further examination, whereupon the parties rested and the evidence closed.

Thereupon defendant moved the court to direct the jury to return a verdict in favor of the defendant and against the plaintiff on the plaintiff's first cause of action, for lack of proof and for the reason

there is a fatal variance between the pleadings and the proof.

Thereupon the defendant moved the court to likewise direct the jury to return a verdict in favor of the defendant and against the plaintiff on the second cause of action, for lack of proof and for the reason there is a fatal variance between the pleadings and the proof.

Thereupon the defendant moved the court to direct a verdict in favor of the defendant and against the plaintiff, on the sixth cause of action, for lack of proof.

Thereupon court ordered that each and all of said motions be and are denied, to which ruling of the court the defendant then and there excepted and exception duly noted.

Thereupon plaintiff moved the court to direct a verdict in favor of the plaintiff and against the defendant on the counter-claim contained in defendant's answer, for reasons stated to the court and read into the record, which motion was by the court denied.

And thereupon, after the arguments of counsel and the instructions of the court, the jury retired in charge of sworn bailiffs, to consider of its verdict.

Thereafter, at 8:30 P. M., the jury returned into court with its verdict, counsel for the respective parties being present as before.

And thereupon the verdict of the jury was duly received by the court, read and filed, and by the

jury acknowledged to be its true verdict as follows, to-wit:

[Title of Court and Cause.]

“We, the jury duly empaneled to try the issues in the above-entitled cause find a verdict in favor of the plaintiff Ernest Maehl in the sum of \$3,368.91.

F. C. CUMMINGS,  
Foreman.”

Judgment ordered entered accordingly.

Thereupon defendant objected and excepted to the form of the verdict on the ground and for the reason that a separate verdict should be returned by the jury herein on each cause of action stated in the plaintiff's complaint.

Entered in open court at Missoula, Montana, October 23, 1939.

C. R. GARLOW,  
Clerk. [386]

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Thereafter, on October 25, 1939, Judgment was duly filed and entered herein, being in the words and figures following, to-wit: [387]

In the District Court of the United States for the  
District of Montana, Missoula Division.

No. 1714.

ERNEST MAEHL,

Plaintiff,

vs.

BARNARD-CURTISS COMPANY,

a Corporation,

Defendant.

### JUDGMENT ON VERDICT

This action came on regularly for trial upon the 14th day of October, 1939, the said parties appearing by their attorneys Pope, Smith & Smith and J. J. McDonald, counsel for Plaintiff, and Toole & Boone, for Defendant. A jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendant were sworn and examined. After hearing the evidence, the arguments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court with their verdict as follows:

“Title of Court, Title of Cause. Verdict. We, the jury duly empaneled to try the issues in the above entitled cause find a verdict in favor of the Plaintiff, Ernest Maehl in the sum of \$3,368.91.

F. C. CUMMINGS,  
Foreman.”

Wherefore by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed and this does order, adjudge and decree that the Plaintiff, Ernest Maehl, do have and recover from the Defendant, Barnard-Curtiss Company, a corporation, judgment in the [388] sum of Three Thousand Three Hundred Sixty-eight Dollars and 91/100 (\$3,368.91), together with interest at the rate of six per cent (6%) per annum from January 1, 1938, in the sum of Three Hundred Sixty-four Dollars and 96/100 (\$364.96), together with the Plaintiff's costs of action taxed at \$180.10.

Judgment entered this 25th day of October, 1939.

C. R. GARLOW,

Clerk

By G. DEAN KRANICH

Deputy

[Endorsed]: Filed and Entered Oct. 25, 1939.

[389]

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Thereafter, on January 18, 1940, Notice of Appeal, was duly filed herein, being in the words and figures following, to-wit: [390]

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To Ernest Maehl, plaintiff herein, and to J. J. McDonald, Walter L. Pope, Russell E. Smith and Kendrick Smith, attorneys for the plaintiff:

You and each of you will please hereby take no-

tice that Barnard-Curtiss Company, a corporation, the defendant in the above entitled action does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain judgment on the verdict made and entered in the above entitled action on the 25th day of October, 1939, wherein the plaintiff, Ernest Maehl was given judgment against the defendant, Barnard-Curtiss Company, a corporation, in the sum of Three Thousand Three Hundred Sixty-eight and 91/100 (\$3,368.91) Dollars with interest thereon at the rate of six percent (6%) per annum from January 1st, 1938 amounting to the sum of Three Hundred Sixty-four and 96/100 (\$364.96) Dollars, together with plaintiff's costs of action taxed [391] in the sum of One Hundred Eighty-eight and 10/100 (\$188.10) Dollars.

You will further please take notice that this appeal is taken from said judgment and from the whole thereof.

Dated this 16th day of January, 1940.

HOWARD TOOLE

W. T. BOONE

Attorneys for Appellant,  
Barnard-Curtiss Company,  
a corporation.

Due and personal service and receipt of copy of the foregoing Notice of Appeal is hereby admitted this 16th day of January 1940.

RUSSELL E. SMITH

Attorney for Plaintiff

[Endorsed]: Filed Jan. 18, 1940. [392]

Thereafter, on January 18, 1940, Designation of Contents of Record on Appeal of Defendant, was duly filed herein, being in the words and figures following, to-wit: [393]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL OF BARNARD-CURTISS  
COMPANY, A CORPORATION.

Whereas, the Barnard-Curtiss Company, a corporation, the defendant in the above entitled action, has filed Notice of Appeal in the Circuit Court of Appeals in the Ninth Circuit from the judgment rendered in the above entitled action on the 25th day of October, 1939.

Now, Therefore, the said appellant does hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal:

(1) The complaint of Ernest Maehl, the plaintiff in the above entitled cause.

(2) The demurrer of the defendant, Barnard-Curtiss Company, a corporation.

(3) The order of the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, removing the above entitled cause for trial to the District Court of the United States for the District of Montana. [394]

(4) The order of the court overruling the demurrer of the defendant, Barnard-Curtiss Company, a corporation.

(5) The answer of the defendant, Barnard-Curtiss, a corporation, including exhibits as follows: Exhibit A, the clearing contract between Ernest Maehl and Barnard-Curtiss Company, a corporation.

(6) The reply of the plaintiff, Ernest Maehl, to counter-claims contained in the defendant's answer.

(7) The motion of the defendant, Barnard-Curtiss Company, a corporation, for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the above entitled action, including Exhibit D, the complaint of C. A. Metcalf vs. the Barnard-Curtiss Company, a corporation, filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite; Exhibit E, the complaint in the case of C. A. Metcalf vs. the Barnard-Curtiss Company filed in the District Court of the Third Judicial District of the State of Montana, in and for the County of Granite, and a second action; Exhibit F, the affidavit of James Barnard, one of the officers of the defendant corporation; but excluding Exhibit A, the complaint in the above entitled action, which document appears elsewhere in the record; further excluding Exhibit B, the answer of the defendant Barnard-Curtiss Company, a corporation, in the above entitled action to the said complaint of the plaintiff Ernest Maehl, which document appears elsewhere in the record; and further excluding Exhibit C, the reply of the planitiff, Ernest Maehl, to



the answer of the defendant Barnard-Curtiss Company, a corporation, which document appears elsewhere in the record. [395]

(8) The motion of the defendant, Barnard-Curtiss Company, a corporation, for a reference of the above entitled action to a master.

(9) The affidavit of Howard Toole in support of the motion of the defendant, Barnard-Curtiss Company, a corporation, for a reference of the above entitled action to a master.

(10) The order of the court overruling the motion for reference.

(11) The transcript of the proceedings at the trial of said action in question and answer form by reason of the assignment of the appellant that there is not sufficient evidence in all of the record to sustain the verdict or judgment.

(12) The verdict.

(13) The clerk's minute entry showing the objection of the defendant, Barnard-Curtiss Company, a corporation, to the form of the verdict.

(14) The judgment.

(15) The motion of the defendant, Barnard-Curtiss Company, a corporation, for a new trial.

(16) The ruling of the court on the motion of the defendant, Barnard-Curtiss Company, a corporation, for a new trial.

(17) The defendant's exhibits 1 to 12 inclusive, all of which were admitted and which appear in the proposed transcript of proceedings; plaintiff's ex-

hibits 14 to 16, inclusive, all of which were admitted and which appear in the proposed transcript of proceedings.

(18) The defendant's exhibit No. 13, being the [396] contract between the defendant, Barnard-Curtiss Company, a corporation, and the Water Conservation Board, which exhibit was admitted by the court.

(19) Notice of Appeal.

(20) Designation of Contents of Record on Appeal.

(21) The Supersedeas Bond.

Dated this 16th day of January, 1940.

HOWARD TOOLE

W. T. BOONE

Attorneys for Plaintiff.

Due and personal service and receipt of copy of the foregoing Designation of Contents of Record on Appeal of Barnard-Curtiss Company, is hereby admitted this 16th day of January 1940.

RUSSELL E. SMITH

Attorney for Plaintiff

[Endorsed]: Filed Jan. 18, 1940. [397]

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Thereafter, on January 25, 1940, a Stipulation re designation of contents of record, was duly filed herein, being in the words and figures following, to-wit: [398]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties to the above entitled action by their respective attorneys, that the Designation of Contents of Record on Appeal of the defendant Barnard-Curtiss Company, may be amended as follows:

(1) By striking out Designation No. 15, the Motion for New Trial.

(2) By striking out Designation No. 16, the ruling of the court on the Motion for New Trial.

(3) By adding a new Designation numbered as follows:

(7½) The Order of the court overruling the Motion of the defendant, Barnard-Curtiss Company for the joinder of C. A. Metcalf as a third party, and the exception of the defendant, Barnard-Curtiss Company made at the time of such order.

Dated this 24th day of January, 1940.

RUSSELL E. SMITH

J. J. McDONALD

Attorneys for Plaintiff

HOWARD TOOLE

W. T. BOONE

Attorneys for Defendant.

[Endorsed]: Filed January 25, 1940. [399]

Thereafter, on February 5, 1940, Bond on Appeal was duly filed herein, being in the words and figures following, to-wit: [400]

[Title of District Court and Cause.]

### BOND

Know all men by these presents, That we, the undersigned, Barnard-Curtiss Company, a corporation, as principal, and the Seaboard Surety Company, a corporation, duly qualified and authorized to execute bonds and undertakings and to act as surety within the State and District of Montana, as surety, are held and firmly bound unto Ernest Maehl, the plaintiff above named, in the full sum of Four Thousand Five Hundred (\$4,500.00) Dollars, to be paid to the said plaintiff, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16 day of January, 1940. [401]

The condition of this obligation is such that whereas, in the District Court of the United States in and for the District of Montana, in the above entitled action, pending in said court, wherein Ernest Maehl is plaintiff and Barnard-Curtiss Company, a corporation is defendant, a judgment was rendered against the defendant, Barnard-Curtiss Company, a corporation, in the amount of Three Thousand Nine Hundred Twenty-one and 97/100

(\$3,921.97) Dollars which judgment was made and entered on the 25th day of October, 1939, and

Whereas, the defendant, Barnard-Curtiss Company, a corporation has filed in said action its notice of appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said defendant proposes to prosecute said appeal to reverse said judgment and desires that execution thereon be stayed pending determination of said appeal;

Now, therefore, in consideration of said appeal and the said supersedeas, if the above named, Barnard-Curtiss Company, a corporation, as such defendant shall prosecute its appeal to effect or shall pay said judgment and answer all damages, interest and costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect. [402]

BARNARD-CURTISS COMPANY,

a corporation

By M. W. BARNARD

Principal

RW

SEABOARD SURETY COMPANY,

a corporation

By G. H. LUTHER

Its Attorney-in-fact thereunto  
duly authorized

Surety

G. H. LUTHER

Montana Resident Agent.

Approved February 5, 1940.

JAMES H. BALDWIN

U. S. District Judge.

District of Montana.

[Endorsed]: Filed Feb. 5, 1940. [403]

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Thereafter, on February 5, 1940, Order of Transmission of Original Exhibits was duly filed and entered herein, being in the words and figures following, to-wit: [404]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL  
EXHIBITS.

Upon application of counsel for the Barnard-Curtiss Company, a corporation, the defendant in the above entitled action, as appearing in the Designation of Contents of the Record on Appeal, it is hereby ordered that in connection with the appeal of the said defendant, Barnard-Curtiss Company, a corporation, to the United States Circuit Court of Appeals for the Ninth Circuit, all original exhibits introduced in evidence in said cause may be transmitted to the said Appellate Court for its inspection.

Dated this 5 day of January, 1940.

JAMES H. BALDWIN

Judge of the United States District Court, District of Montana.

[Endorsed]: Filed and Entered Feb. 5, 1940.

[405]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD

United States of America,  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 405 pages, numbered consecutively from 1 to 405 inclusive, constitute a full, true and correct transcript of all portions of the record in case No. 1714, Ernest Maehl vs. Barnard-Curtiss Company, required to be incorporated therein by designation of appellant and Stipulation of the parties, as the record on appeal therein, except, the exception of defendant to the order of the court denying its motion to make C. A. Metcalf a third party, of which there is no record, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, the following exhibits introduced and received in evidence at the trial of said cause, to-wit: defendant's exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, and plaintiff's exhibits Nos. 14, 15 and 16.

I further certify that the costs of said transcript amount to the sum of Forty-six and no/100 Dollars (\$46.00) and have been paid by the appellant.

Witness my hand and the seal of said court at  
Helena, Montana, this February 6, A. D. 1940.

[Seal] C. R. GARLOW,  
Clerk U. S. District Court,  
District of Montana.

By H. H. WALKER  
Deputy [406]

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[Endorsed]: No. 9442. United States Circuit  
Court of Appeals for the Ninth Circuit. Barnard-  
Curtiss Company, a corporation, Appellant, vs.  
Ernest Maehl, Appellee. Transcript of Record.  
Upon Appeal from the District Court of the United  
States for the District of Montana.

Filed February 8, 1940.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



In the United States Circuit Court of Appeals for  
the Ninth Circuit.

No. 9442

BARNARD-CURTISS COMPANY,  
a corporation,

Appellant

vs.

ERNEST MAEHL,

Appellee.

To the Clerk of the United States Circuit Court  
of Appeals for the Ninth Circuit:

I.

DESIGNATION OF PARTS OF THE RECORD  
TO BE PRINTED

You will please be advised that the appellant, Barnard-Curtiss Company, a corporation, does hereby designate for printing in the above appeal the entire transcript of the record forwarded to you by the Clerk of the United States Court for the District of Montana, in the above entitled action excepting therefrom only the court's instructions commencing on page 282 of the typewritten transcript, line 28 and ending on page 311 thereof, line 25, and that said appellant will rely upon the record in this appeal as so designated.

## II.

STATEMENT OF POINTS ON WHICH THE  
APPELLANT INTENDS TO RELY ON  
APPEAL

Whereas, the appellant, Barnard-Curtiss Company, a corporation, has filed notice of appeal and is taking an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered in the above entitled action in the District Court of the United States for the District of Montana on the 25th day of October, 1939, and

Whereas, The record on appeal has been filed in said Circuit Court of Appeals,

Now, therefore, said appellant does hereby make and file its statement of the points upon which it intends to rely on said appeal:

1. The appellant contends that the court erred in overruling the demurrer of the appellant, Barnard-Curtiss Company, a corporation, to the complaint.

2. The appellant will contend that the court erred in denying the motion of the appellant, Barnard-Curtiss Company, a corporation, for leave to serve summons and complaint on C. A. Metcalf and to make him a third party to the above entitled action, said motion having been filed by the said appellant and having been denied by order of court on the 24th day of April, 1939.

3. The appellant will contend that there is not sufficient evidence in all of the testimony offered by the appellee to justify the court in submitting the first cause of action of the appellee, Ernest Maehl to the jury in that there was not sufficient proof to go to the jury upon the question of the making of the contract alleged in said first cause of action of the complaint.

4. The appellant will further contend that there was not sufficient evidence in all of the testimony introduced by the defendant to justify the court in submitting the second cause of action of the appellee, Ernest Maehl to the jury in that there is not sufficient proof of the making of the contract alleged in appellee's second cause of action.

5. The appellant will further contend that there is not sufficient evidence in all of the testimony submitted by the appellee to justify the court in submitting the appellee's sixth cause of action to the jury in that the evidence fails to show that the appellant ever agreed to pay the appellee the sums claimed by him in said sixth cause of action.

6. The appellant will contend that the court was in error in denying and refusing appellant's motions for a directed verdict upon the ground stated therein which motions appear at pages 280, 281 and 282 of the typewritten transcript. The order of the court overruling the said motions appears on page 281, line 16 and page 282, line 17 of the typewritten transcript.

7. The appellant will further contend that the court erred in overruling the appellant's objection to the form of the verdict.

Respectfully submitted,

HOWARD TOOLE

W. T. BOONE

Attorneys for Appellant,  
Barnard-Curtiss Company a  
corporation.

Due and personal service and receipt of copy of the foregoing Designation of Parts of the Record to be Printed and Statement of Points on which the Appellant intends to Rely on Appeal, is hereby accepted this 24th day of February, 1940.

J. J. MacDONALD

KENDRICK SMITH

Attorneys for Appellee,  
Ernest Maehl.

[Endorsed]: Filed Feb. 27, 1940. Paul P. O'Brien, Clerk.